82-1538

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HILLSDALE COLLEGE,
Petitioner,

v.

DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT W. BARKER
Counsel of Record
GORDON C. COFFMAN
LUISA L. LANCETTI
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4141
Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether students in need of certain federal student loans and grants may lawfully be deprived of such loans and grants by termination order of the Department of Education, solely because their private, independent college, in order to remain free from governmental intervention in its affairs, refuses federal assistance and therefore refuses to execute an Assurance wherein it certifies its coverage under and compliance with regulations promulgated under Title IX of the Education Amendments of 1972.*

2. Where a college receives no federal assistance and does not discriminate, may all of the college's educational activities and programs be made subject to regulations promulgated by the Department under Title IX merely because it enrolls students who participate in certain federal student loan and grant programs.

These same issues and others, also present in the instant case, will be argued before the Court in *Grove City College v. Bell*, 687 F.2d 684 (3rd Cir. 1982), *cert. granted*, 51 U.S.L.W. 3598 (U.S. Feb. 22, 1983) (No. 82-792).**

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* 20 U.S.C. §§ 1681-1686 (1976) ("Title IX").

** In the administrative proceedings below, Hillsdale College argued that, in the alternative, Title IX and its implementing regulations were unconstitutional, if the Department's position were upheld. (*See* Brief of Hillsdale College, Administrative Compliance Proceeding, filed May 15, 1978, at 37-50.) Hillsdale believes that the Court should not have to reach the Constitutional challenge raised in order to properly resolve this controversy. However, Hillsdale is aware that the Questions Presented by Grove City College in its petition for writ of certiorari to the Third Circuit Court of Appeals, filed November 9, 1982, includes a First Amendment Constitutional question (*i.e.*, "Does the application of Title IX regulation to the College and its students violate First Amendment rights to academic freedom and association?"). Thus, as it did before the

PARTIES

Petitioner: Hillsdale College, Hillsdale Michigan.

Respondents: Department of Education; the Secretary of the Department; the United States of America.***

Sixth Circuit Court of Appeals (*see* Brief of Hillsdale College, filed September 22, 1980, at 2 n.3), Hillsdale preserves its Constitutional challenge, and if this petition is granted reserves the right to argue this claim before the Court, if necessary.

*** The court below identified respondents, in the caption of its decision, as the "Department of Health, Education & Welfare, *et al.*" ("HEW"). (Appendix ("App.") at 1a.) While the suit was originally brought by this agency (App. at 55a), it no longer exists, and all of HEW's functions relating to the interpretation and enforcement of Title IX have been transferred to the Department of Education. *See* Pub. L. No. 96-88 (October 17, 1979), 93 Stat. 677-78. For this reason, in July 1980, Hillsdale filed with the Sixth Circuit Court of Appeals a motion to substitute the Department of Education and its Secretary, for HEW and its Secretary. We have been advised that the court did grant this motion. For the sake of clarity, since HEW no longer exists, we have taken the liberty of correcting the caption herein in conformance with the substitution granted by the court below. In this petition we will refer to both HEW and its successor, the Department of Education, as "the Department."

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Hillsdale College respectfully requests that the Court grant its petition for writ of certiorari, seeking review of the Sixth Circuit Court of Appeals' decision in this case, and further requests that this case be consolidated for consideration with *Grove City College v. Bell.*[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 696 F.2d 418 (6th Cir. 1982) and appears in the Appendix herein. (App. at 1a.)

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[1] As mentioned, the Court recently granted Grove City College's petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. *Grove City College v. Bell*, 687 F.2d 684 (3rd Cir. 1982), *cert. granted*, 51 U.S.L.W. 3598 (U.S. Feb. 22, 1983) (No. 82-792) ("*Grove City College*").

The decision of the HEW Reviewing Authority, Civil Rights, and the Initial Decision by the Administrative Law Judge in this proceeding are not reported but also appear in the Appendix. (App. at 43a, 55a.)

JURISDICTION

The decision of which review is now sought was dated and entered on December 16, 1982. (App. at 42a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES AND REGULATIONS INVOLVED

The following statutory provisions and regulations are involved in this petition. They are reproduced in the Appendix:

1. Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1976) (App. at 80a).
2. Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682 (1976) (App. at 84a).
3. The regulations of the Department of Education, 34 C.F.R. Part 106 (1982)[2] (App. at 86a).

STATEMENT OF THE CASE

This case concerns the scope of Title IX of the Education Amendments of 1972 ("Title IX"), and the proper ambit of the Department of Education's regulatory authority under this statute. At issue in this case is the propriety of the Department's attempted exercise of regulatory control over the operations of Hillsdale College, a private and independent college which refuses federal

[2] When this lawsuit was initiated, these regulations were administered by HEW and were codified at 45 C.F.R. Part 86. They were recodified at 34 C.F.R. Part 106 in substantially identical form on May 9, 1980, in connection with the establishment of the Department of Education. 45 Fed. Reg. 30802, 30962-3 (1980).

assistance because of its desire to foster and maintain academic independence and autonomy.[3]

Title IX prohibits sex discrimination in education programs or activities which receive federal assistance.[4] There is no allegation or showing of sex or other discrimination at Hillsdale. Pursuant to Title IX's implementing regulations,[5] the Department has designated Hillsdale College a "recipient" of "federal financial assistance,"[6] and for this reason has sought to exercise

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[3] Hillsdale College was founded in 1844 and is a private, nonsectarian, coeducational college located in Hillsdale, Michigan. Its present enrollment is approximately 1,000 students. Hillsdale was one of the first colleges in the United States to admit women equally with men. Half of its enrolled students are women.

[4] 20 U.S.C. § 1681.

[5] Under the statute, the Department is authorized to issue implementing regulations, and to enforce such regulations by administrative enforcement proceedings. The ultimate sanction for noncompliance with the statute is the termination of federal assistance to "the particular program, or part thereof . . .," in which noncompliance is found. 20 U.S.C. § 1682. This limited termination provision has been termed the "program-specificity" requirement. The program-specific aspect of the Title IX legislation has been held by this Court to impact both upon the Department's authority to "promulgate regulations and to terminate funds." *North Haven Board of Education v. Bell*, 456 U.S. 512, 534-38 (1982) (*"North Haven"*). *See* discussion *infra*, at 11-12.

[6] As noted above, under Title IX, sexual discrimination is prohibited in educational programs or activities which receive federal assistance (20 U.S.C. § 1681). Under the Department's implementing regulations, however, the terms "receives or benefits" are deemed equivalent in meaning—a result that cannot be countenanced under the statute. A review of the pertinent regulations illustrates the problem. 34 C.F.R. § 106.11 (App. at 98a) provides:

> Except as provided in this subpart, this Part 106 applies to every recipient and to each education program or activity operated by such recipient which receives *or benefits* from Federal financial assistance. (Emphasis added.)

Moreover, under Sections 106.2(g)(1)(ii) (App. at 89a) and (h) (App. at 90a), "recipient" and "Federal financial assistance" are

regulatory control over all of the operations of the College.[7]

The sole basis for the Department's efforts to secure an executed Assurance and its concomitant attempt to assert regulatory control over the College is that certain students attending Hillsdale participate in four federal loan and grant programs.[8] Hillsdale College itself does

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defined in the following fashion so as to implicate Hillsdale, in contravention to the plain language of Title IX.

Section 106.2(h) defines "Recipient" to include:

> [A]ny public or private agency, institution or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives *or benefits* from such assistance . . . . (Emphasis added.)

Section 106.2(g)(1)(ii) defines "Federal financial assistance" to include:

> Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

[7] *See Hillsdale College v. HEW*, 696 F.2d 418, 424-25 (6th Cir. 1982) (*"Hillsdale College"*). (App. at 13a.)

[8] The particular programs at issue are the National Direct Student Loan Program ("NDSL") (20 U.S.C. §§ 1087aa *et seq.*), the Supplemental Educational Opportunity Grant Program ("SEOG") (20 U.S.C. § 1070b), the Basic Educational Opportunity Grant Program ("BEOG") (20 U.S.C. § 1070a), and the Guaranteed Student Loan Program ("GSL") (20 U.S.C. §§ 1071 *et seq.*). In the NDSL and SEOG programs, the College voluntarily functions in an administrative capacity, by disbursing educational funds provided by the federal government to student applicants solely on the basis of independently predetermined eligibility criteria, which consider need. Under the BEOG and GSL programs, the College's only function is ministerial—as it certifies student enrollment and educational costs. With respect to the GSL program, Hillsdale has always maintained that it comes within Title IX's exemption for contracts of insurance or guaranty (20 U.S.C. § 1682), but the Department has disagreed. It is our understanding that the Department has reversed its opinion regarding GSL participation in the *Grove City College* case. Thus, we assume that the question of the presence of the GSL Program within Title IX is not at issue here.

not receive federal assistance in any of the specified student loan and grant programs. Moreover, the College does not operate any other educational program or activity which receives federal assistance.[9] It must be stressed that Hillsdale is not seeking the right to discriminate, nor does it in fact discriminate.[10] Instead, the College's decision to forego federal assistance is entirely a matter of academic principle and policy of independence from federal governmental control. In fact, Hillsdale does not question the propriety of the statute's nondiscrimination requirements. The record in this case shows no allegation or finding of discrimination.[11] Moreover, the College has historically followed a consistent and independent policy of non-discrimination. Hillsdale College admitted both blacks and women to the College *before* the Civil War. Indeed, the first woman in Michigan to graduate with a Bachelor of Arts Degree (she was the second woman in the United States to do so) received her degree from Hillsdale in 1852.

Specifically, throughout this proceeding, the Department has sought the College's submission of an Assurance of Compliance with the Title IX regulations.[12] This document requires a signatory to confirm that each education program or activity operated by the applicant/institution to which the regulations apply will be conducted in compliance with Title IX and the regulations.[13]

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[9] *Hillsdale College*, 696 F.2d at 420. (App. at 3a.)

[10] *See supra*, n.3. *See also Hillsdale College*, 696 F.2d at 419. (App. at 2a.)

[11] *Hillsdale College*, 696 F.2d at 419. (App. at 2a.) ("[N]o allegations of actual sexual discrimination on the part of the college have been made or are before this court.")

[12] *Id.* at 421. (App. at 6a.) The document the College was asked to submit was HEW Form 639A. It is reproduced in the Appendix at 125a.

[13] *Id.* The basis for the Department's requirement is found in 34 C.F.R. § 106.4 (1982) (App. at 93a), which provides:

> (a) General. Every application for Federal financial assistance for any education program or activity shall as a condition of its

Hillsdale has refused to execute the Assurance because it challenges the applicability of the statute to any of its operations and questions the Department's theory of regulatory coverage.[14]

Pursuant to its regulations, in 1977 the Department sought Hillsdale's voluntary compliance with the Assurance of Compliance requirement. Hillsdale repeatedly refused to submit an executed Form 639A, arguing that the regulations improperly deemed Hillsdale a "recipient" of federal assistance under Title IX, and subjected all of the College's operations to governmental regulation.

After failing in efforts to secure Hillsdale's voluntary compliance with the Assurance requirement,[15] in December 1977, the Department commenced an administrative compliance proceeding against Hillsdale, requesting an order terminating and refusing to grant or continue federal financial assistance to Hillsdale's students solely because of the College's refusal to execute the Assurance.

On August 23, 1978, the Administrative Law Judge ("ALJ") issued his Initial Decision[16] wherein he found the College to be a "recipient" of federal financial assistance under the specified loan and grant statutes. However, the ALJ denied the Department's request for an order terminating federal financial assistance to Hillsdale's students. The Judge's ruling in this regard was based upon reliance on a series of federal cases which had held that the regulations pertaining to the prohibi-

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approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.

[14] *Hillsdale College*, 696 F.2d at 424. (App. at 11-12a.)

[15] *Id.* at 421-22. (App. at 6a.)

[16] App. at 55a.

tion of sex discrimination in employment practices were invalid.[17] The ALJ held that it would be arbitrary and capricious to require the College to assure compliance with regulations that had been declared invalid.

In October 1979, the Reviewing Authority, Civil Rights, issued its Final Decision.[18] The Authority granted exceptions filed by the Department and ruled that Hillsdale College would be required to execute the Assurance of Compliance as a condition of its students' continued receipt of federal financial assistance. The Reviewing Authority found that the College could properly be deemed a "recipient" of "federal financial assistance" under Title IX. The Authority reversed the ALJ on the issue of the validity of the Assurance of Compliance requirement, finding it to be enforceable, insofar as it only required the College to assure compliance with "lawful regulations." [19]

Pursuant to the judicial review provisions contained in 20 U.S.C. § 1683,[20] Hillsdale petitioned directly to the Court of Appeals for the Sixth Circuit for review of the administrative decisions. Before the court, Hillsdale argued that it was not a "recipient" of "federal financial assistance" under Title IX, and thus was not subject to the statute's requirements. The College also contended that the federal loans and grants received by its students could not legally be terminated because of its refusal to execute the Assurance, since enforcement under Title IX is "program specific." The College questioned the Department's efforts to enforce an institution-wide applica-

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[17] 34 C.F.R. §§ 106.51-106.61 (1982) (Subpart E). (App. at 117-124a.) In *North Haven*, this Court ruled that the employment practices of educational institutions *are* subject to regulation under Title IX. *North Haven*, 456 U.S. at 519-38. Thus, this aspect of the ALJ decision has lost its significance.

[18] App. at 43a.

[19] App. at 52a. *See also Hillsdale College*, 696 F.2d at 423. (App. at 10a.)

[20] App. at 85a.

tion of the statute. In Hillsdale's view, under the statute, "recipients" could only be required to assure compliance as to *particular* programs receiving such assistance; since Hillsdale maintained no such programs, it argued that it was not subject to such an edict. Hillsdale also argued that termination of federal assistance under Title IX could not occur unless there had been a showing of actual discrimination in a particular program receiving federal assistance.[21]

In an opinion dated December 16, 1982, the Court of Appeals for the Sixth Circuit entered its decision in this case, reversing the Reviewing Authority's order.[22] In its decision, however, it "agree[d] with Hillsdale in part and HEW in part."[23] Of paramount importance, the court found Hillsdale to be a "recipient" under Title IX, thereby subject to regulation under the statute.[24] The Court also found that federal financial assistance to Hillsdale's students may be lawfully terminated without a finding that the College is actually discriminating in a particular program receiving aid on the basis of sex. Thus, the net effect of the decision below was to reject the basics of Hillsdale's position and to subject it to regulation and its students to termination of loans and grants unless Hillsdale capitulated in its pursuit of basic principles of independence.

However, the court agreed with Hillsdale's position on the "program-specificity" issue. It found that the Department's policy of enforcement and regulation were invalid, to the extent that it sought to subject Hillsdale's operations to institution-wide control. Thus, the court rejected the Department's position that the entire operation of the College could be considered the relevant "pro-

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[21] *See* discussion of Hillsdale's position. *Hillsdale College*, 696 F.2d at 421-22. (App. at 6-7a.)

[22] *Id.* at 430. (App. at 26.)

[23] *Id.* (App. at 25a.)

[24] *Id.*

gram" under Title IX. The court concluded that the regulations "as applied . . ., contravene the program-specific nature of Title IX by equating the statutory phrase 'education program and activity' with the education institution itself." [25]

REASONS FOR GRANTING THE WRIT

A. There is a Conflict of Decisions in the Circuits on Important Issues Involved Herein and Currently Pending Before this Court; Consolidation of this Case With the Case of *Grove City College v. Bell* Would Be Appropriate.

On February 22, 1982, a writ of certiorari to the Third Circuit Court of Appeals was granted by the Court in the case of *Grove City College v. Bell*.[26] The decision in *Grove City College* by the Third Circuit conflicts with the decision of the Sixth Circuit in *Hillsdale College*. The central issue in that case is the same as in this case—excessive government regulation of private, independent colleges. For this reason, Hillsdale College respectfully requests that its case be consolidated for review and consideration by the Court with the *Grove City College* case.

The recent decision of the Sixth Circuit in *Hillsdale College* has created a conflict between the Circuits which has been relied upon by Grove City College in its successful petition for writ of certiorari. The consolidation of these cases will allow the Court to fully examine the parameters of the important issues before it, and to resolve the conflict presented. In doing so, the Court should have the benefit of the views of both Hillsdale College and Grove City College.[27]

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[25] *Id.* at 424. (App. at 12a.)

[26] *See Grove City College, supra* n.1.

[27] It would frustrate Hillsdale's long and expensive efforts since 1975 to establish principles of academic and educational independence if the decision of the Sixth Circuit were allowed to become final pending review by this Court of *Grove City College*.

In both cases, private, independent colleges are seeking to avoid federal control by refusing to accept federal financial assistance. In each case, the colleges refused to execute an Assurance of Compliance, even though there was no allegation of discrimination at issue. Moreover, in each case the only basis for the Department's exercise of regulatory authority was the participation, by certain students attending the colleges, in student assistance programs.[28]

In the *Grove City College* case, the Third Circuit ruled that Grove City may be deemed a "recipient" of federal financial assistance by virtue of the participation by its students in the BEOG financial assistance program. In *Hillsdale College*, the Sixth Circuit also found the College to be a "recipient" because of its students' participation in other federal loan and grant programs. Thus, with respect to the issue of "recipient" status, the Sixth Circuit ruled in accord with the Third Circuit in *Grove City College*, finding that the colleges are properly subject to federal regulation under Title IX by virtue of the students' participation in federal loan and grant programs.[29] Both Circuits so ruled despite the fact that neither Col-

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[28] The only factual distinction is that in the *Grove City College* case, the BEOG program is the only federal assistance program at issue. The applicability of the GSL program had originally been at issue, but the Department has apparently reversed its position concerning it. *See supra* n.8. In *Hillsdale College*, additional "campus-based" educational assistance programs are involved. Said programs require minimal college administration. *See, e.g.*, discussion of NDSL and SEOG programs, *supra* n.8. However, Hillsdale submits that the legal analysis of the significance of the College's involvement in the student assistance programs, and whether they constitute a "program or activity" under Title IX, remains the same in both factual contexts.

[29] It should be noted that the rationale behind the Sixth Circuit's ruling on the "recipient" issue is not readily decipherable upon review of the Sixth Circuit's opinion. In the court's conclusion, it finds Hillsdale to be a "recipient" and subject to Title IX regulation. However, it reaches this decision without providing any discussion concerning the reasoning or basis for this result.

lege operates any program or activity receiving federal assistance, as required by the statute. Hillsdale submits that such a result is contrary to the plain language of the statute, its legislative history, and reasoned judicial precedent.

In *North Haven Board of Education v. Bell*,[30] this Court held that the Department has jurisdiction under Title IX to consider complaints of employment discrimination in programs or activities receiving federal financial assistance.[31] In doing so, however, the Court rejected the Department's position that its regulatory authority under the statute was institution-wide in scope. The Court stated that Congress had rejected an institutional approach under the statute, in favor of a prohibition of sexual discrimination in particular education programs receiving federal assistance.[32] Specifically, the Court recognized that the coverage and enforcement of Title IX must be "program-specific":

> [A]n agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902.[33]

While the Supreme Court in *North Haven* recognized the "program-specific" nature of Title IX, the definition of what constitutes a program or activity under Title IX remains an open matter. The Court expressly declined to define the initial coverage and jurisdiction of the statute.[34] The *Grove City College* and *Hillsdale College* cases

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[30] 456 U.S. 512 (1982).

[31] *Id.* at 519-38.

[32] *Id.* at 538.

[33] *Id.* at 534-38.

[34] *Id.* at 529-30. ("[W]e do not undertake to define 'program' [under Title IX] in this opinion.")

present precisely this issue. Hillsdale submits that this issue is ripe for consideration by the Court at this time.

It is in large measure because of the overriding significance, to the entire college and student community in the United States generally, of the issue of what constitutes a "program or activity" under Title IX, that Hillsdale urges the Court to review the decision below. Despite the Sixth Circuit's reversal of the Reviewing Authority's decision in its case, Hillsdale perceives the advances gained in the Sixth Circuit to be less than the necessary clarification of the law. From the outset of administrative proceedings in this case over five years ago, Hillsdale's basic and fundamental contention has been that it is not subject to Title IX and its implementing regulations, however limited or broad in scope they may be construed. Hillsdale College, in order to remain free from federal control and intervention in its affairs, has, as a policy matter, rejected federal financial assistance.[35] Thus, the Sixth Circuit's ruling on the program-specificity issue, while heartening, cannot suffice for the College in its efforts to remain completely independent of federal control.

Another issue of importance has been decided in opposite and conflicting ways by both the Third and Sixth Circuits. In the *Grove City College* case, the Third Circuit held that receipt by students of federal assistance rendered *all* of the operations of the College subject to Title IX enforcement and regulation.[36] The court of appeals therein ruled that the statutory phrase "program or activity" contemplated statutory coverage over the entire educational institution, and that the instituion as a whole may therefore be deemed the relevant "program" under

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[35] This principle—of private educational institutions being free from federal regulation—is considered by the Trustees of Hillsdale so important that they have authorized the raising of a "Freedom Fund" to be relied upon if necessary to help replace, by student scholarships, any federal help which may be denied its students.

[36] *Grove City College*, 687 F.2d at 696-700.

Title IX. In *Hillsdale College*, although the Department contended it had institution-wide regulatory authority under the statute, the Sixth Circuit ruled to the contrary and found that the regulations were invalid "to the extent that they purport to subject Hillsdale College as an institution to the strictures of Title IX." [37] The conflict between the Circuits creates confusion in the entire academic community and should be clarified by this Court.[38]

With regard to the "program-specificity" issue, the *Hillsdale College* court explicitly recognized that the *Grove City College* case raised the "same issue as that presented here . . . ." [39] However, the Sixth Circuit in *Hillsdale College* took strong exception with, and declined to follow, the Third Circuit's decision that the entire college is the relevant "program" under Title IX.[40] Thus, the decision by the Sixth Circuit on the program-specificity issue is in direct conflict with earlier precedent provided it by the Third Circuit in the case of *Grove City College*. The decision by the Third Circuit in *Grove City College* on the "program-specificity" issue also is in conflict with the decision by the First Circuit in *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir.), *cert. denied*, 456 U.S. 928 (1981).

Hillsdale believes that the decision by the Sixth Circuit on the program-specificity issue represents the reasoned and correct approach to this issue. A grant of Hillsdale's petition and a consolidation of the cases will assist the

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[37] *Hillsdale College*, 696 F.2d at 424. (App. at 12a.)

[38] In particular, the court decided that the regulations "contravene the program-specific nature of Title IX by equating the statutory phrase 'education program and activity' with the educational institution itself." *Id.* In reaching this decision, the court relied on applicable legislative and judicial precedents and specifically cited the recent decision by this Court in *North Haven*, concerning the program-specific limitation contained in Title IX. *Id.* at 423-25. (App. at 11-13a.)

[39] *Hillsdale College*, 696 F.2d at 429. (App. at 23a.)

[40] *Id.* (App. at 24a.)

Court in examining the issues and will provide the Court with additional record information to dispose of the conflicts. Any decision reached in the *Grove City College* case will necessarily involve the same issues as those in *Hillsdale College*. A decision will impact upon all future actions of Hillsdale College and will affect fundamental interests of that College, as well as many others throughout the United States. Thus, Hillsdale's petition should be granted.

B. This Case Involves Important Issues Concerning the Scope of Governmental Authority to Regulate Private, Independent Colleges Which Decline Federal Assistance; These Issues Require Resolution by the Court.

This case raises issues of critical importance to a sizeable segment of the academic community. At issue is the ability of a private college to operate independently from governmental control and intervention, which the Department asserts as a condition of its continuation of educational assistance to Hillsdale's students. Specifically, at issue is the legality of the Department's efforts to designate Hillsdale College a "recipient" of federal financial assistance, and its concomitant effort to subject all of the activities and programs of the College to federal control. Hillsdale does not argue with the merits of the Title IX legislation; rather, it disputes the authority of the federal government to regulate the activities of a private, independent college which refuses federal assistance, and which is not even alleged to be in violation of the anti-discrimination laws.

The coverage of Title IX is, by its terms, limited to "education program[s] or activit[ies] *receiving* federal financial assistance.[41] However, the Department's definition of "recipient," [42] as embodied in its regulations, is not consistent with this statutory limitation. Instead of "receipt" alone being the touchstone of coverage, as pro-

[41] 20 U.S.C. § 1681.

[42] *See* regulatory definition of "Recipient," *supra* n.6.

vided by statute, the Department asserts that "receives or *benefits*" are the operative words, even though the words "receipt" and "benefit" are not equivalent in meaning.

The regulations, as applied to Hillsdale, are in excess of the statutory authority conferred upon the Department by Congress. Hillsdale enrolls students who "receive Federal financial aid," but Hillsdale does not operate any "education program or activity" which itself receives such assistance. The financial aid at issue here is not financial assistance "to an education program or activity," but assistance *to students* to enable them to attend the college they wish.

There is a broad consensus that independent private educational institutions provide an important diversity and balance to what would otherwise be an exclusively state-run system, and that the preservation of that diversity is in the national interest.[43] Despite this consensus,

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[43] For example, Joseph Califano, a former Secretary of the Department, stated of private colleges and universities:

> They have been guardians of independent thinking and academic freedom, enjoying a bit more insulation from the whims and pressures of politics than their tax-supported sisters.
>
> Perhaps the greatest contribution of these private institutions, beyond training talent for the nation, has been diversity; the rich variety that colleges like this lend to the American educational landscape. What an incredibly rich resource: Hundreds of institutions, each independent; each solving its problems in its own way; each a vital center of innovation and experiment; each with its own special commitment to cultural and moral values.
>
> It is this diversity that gives American higher education and American life so much of their vitality. It is this diversity that your national government is pledged to nourish and safeguard. 123 Cong. Rec. E3798 (daily ed. June 15, 1977).

See also 117 Cong. Rec. 39249 (1971) (remarks by Rep. Erlenborn); H.R. No. 554, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2590.

governmental regulation of private university education has grown so pervasive and particular that there is a genuine concern that the diversity represented by such institutions will soon disappear as all universities are increasingly compelled to conform to a pristine federal model or archetype.[44]

The need for a judicial resolution to the important issues raised herein is illustrated by the recent decision in *University of Richmond v. Bell*,[45] and its subsequent evaluation by the Department. In *Richmond*, the district court considered the ability of the Department to investigate discrimination complaints in the University's athletic program. The basis for the assertion of Department regulatory authority was the presence of student assistance programs and a minor library grant at the University.[46] The district court rejected the efforts of the Department to assert such control over the University, holding that the Department had no authority under Title IX to investigate and regulate the athletic program of a private university where said program received no *direct* federal financial assistance.[47] In rejecting the Department's position that the athletic department comes within

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[44] *See* the satements of Kingman Brewster, then President of Yale University, and of Dallin Oaks, then President of Brigham Young University, in Hearings on *Sex Discrimination Regulations Before the Subcommittee on Post Secondary Education of the House Committee on Education and Labor*, 94th Cong., 1st Sess. at 231-37 (Oaks) and at 234 (Brewster), and the statement of John R. Hubbard, President of the University of Southern California, quoted in Oaks, *A Private University Looks at Government Regulation*, 4 J. of Coll. and U. Law 4, 8 (1976). *See also* G. Roche, *The Balancing Act* (1974). The author, Dr. George C. Roche, III, is the President of Hillsdale College.

[45] 543 F. Supp. 321 (E.D. Va. 1982) (*"Richmond"*).

[46] The programs involved included the NDSL, SEOG, BEOG and College Work-Study Programs. *Id.* at 323.

[47] *Id.* at 328.

its jurisdiction because it "benefits" from funds which are received by the University or other University programs (which, in turn, release University funds to be used in the athletic department), the court relied upon a number of cases which have so ruled.[48] Thus, the district court held that the statute's program-specific requirement must be respected by the Department.

Although this is a district court ruling, the nature of the conflict between that decision and *Grove City College*, as well as its variance from the original position of the Department on the issues involved, warrants review by this Court. Despite a ruling that is in direct conflict with the Department's position in these various proceedings, the government has specifically decided not to appeal the *Richmond* decision to the Fourth Circuit Court of Appeals. This decision to forego an appeal is based on its stated opinion that the decision in *Richmond* was "analytically and legally sound," even when expressly considered with reference to the Third Circuit decision in *Grove City College*.[49] This reaction by the Department is significant indeed, considering the history of this proceeding, and its consistent prior position to the contrary.

It appears that the Department has now taken the position that although Hillsdale and Grove City Colleges are "recipients," and subject to the Assurance of Compliance requirement, the statute and its regulations must be interpreted in a "program-specific" manner.[50] In light of the conclusive decision by the Court on the "program-specificity" issue in *North Haven*, the Department may legitimately have chosen to change its position. However, it is not accurate for the Department to argue that "the *Hillsdale* court misapprehended the Department's

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[48] *Id.*

[49] *See* Letter of Assistant Attorney General Reynolds to Clarence Pendleton, Jr. (September 16, 1982). (App. at 132-33a.)

[50] *See* Brief for the United States in Opposition to Grove City College's Petition for Writ of Certiorari, filed January 21, 1983.

position"[51] on this matter. The Department has consistently argued, and did assert in the court below, that its authority to regulate Hillsdale is institution-wide in scope.[52] Thus, the apparent shift in administrative policy further illustrates the need for a definitive and lasting judicial resolution of this controversy by this Court. An administrative solution to the issues presented simply will not suffice, as future administrations and changing political considerations may reverse any victory obtained by the College.[53]

CONCLUSION

Throughout the many years of this proceeding, Hillsdale College's actions have been motivated by its principled objection to the excessive intrusion by the government into its private academic affairs. The College believes that the conflicting cases of *Grove City College* and *Hillsdale College* should be considered by this Court at

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[51] *Id.* at 7 n.7.

[52] For example, the Department argued in its brief before the Sixth Circuit that the termination order was

> 'program specific' because Hillsdale itself is the relevant 'program or activity.' The financial assistance provided to the college through the student aid programs is not directed to or limited to any particular education 'program or activity' at the college and the entire college benefits from the assistance provided.

Brief of the Department of Education, Sixth Circuit Court of Appeals, filed Nov. 25, 1980, at 12.

[53] In Hillsdale's opinion, the need for a final judicial resolution may have been presaged by this Court's statement in *North Haven*, 456 U.S. at 538-39:

> In construing regulations, the Court normally defers to the agency's interpretation. . . . Here, however, that interpretation has fluctuated from case to case, and even as this case has progressed. . . . Accordingly, *there is no consistent administrative interpretation of the Title IX regulations for us to evaluate.* (Citations omitted, emphasis added.)

the same time. To provide judicial finality, the Court should review Hillsdale's case and provide all parties with direction and a final resolution to these controversies.

WHEREFORE, for the reasons set forth herein, petitioner respectfully prays that a writ of certiorari issue to review the decision of the court of appeals.

Respectfully submitted,

ROBERT W. BARKER
Counsel of Record
GORDON C. COFFMAN
LUISA L. LANCETTI
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4141
Attorneys for Petitioner

March 16, 1983

82-1538

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HILLSDALE COLLEGE,
Petitioner,

v.

DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT W. BARKER
Counsel of Record
LUISA L. LANCETTI
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4141
Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF APPENDICES

APPENDIX A

[OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 80-3207

HILLSDALE COLLEGE,
Petitioner,
v.
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ET AL.,
Respondents.

ON REVIEW FROM THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Decided and Filed December 16, 1982

Before: EDWARDS, Chief Circuit Judge; CECIL* and BROWN**, Senior Circuit Judges.

BROWN, Senior Circuit Judge, delivered the opinion of the Court, in which CECIL, Senior Circuit Judge, joined. EDWARDS, Chief Judge, (pp. 25-38) filed a separate dissenting opinion.

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* Judge Cecil concurred in this opinion prior to his death on November 26, 1982.

** Circuit Judge Brown retired from regular active service under the provisions of 28 U.S.C. § 371(b) on June 16, 1982, and became a Senior Circuit Judge.

BAILEY BROWN, Senior Circuit Judge. This appeal arises out of a compliance proceeding initiated against Hillsdale College by the General Counsel of the Department of Health, Education, and Welfare ("HEW") [1] in December, 1977, pursuant to the provisions of Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1976) ("Title IX"), and the regulations promulgated thereunder.[2] HEW sought an order terminating the financial assistance Hillsdale College students receive through various federal student loan and grant programs because of Hillsdale's refusal to file HEW Form 639A ("Assurance of Compliance with Title IX Regulations") as required by 34 C.F.R. § 106.4 (1981).[3] Hillsdale's refusal to execute the Assurance of Compliance is the only basis for the HEW enforcement action; no allegations of actual sex discrimination on the part of the college have been made or are before this court. For the reasons stated herein, we hold that Hillsdale College is not required to execute the Assurance of Compliance as a condition of its students' continued receipt of federal financial assistance and hereby reverse the Order issued below to that effect.

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[1] HEW's functions under Title IX were transferred in 1979 to the Department of Education. See *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. ——, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). Both agencies shall hereinafter be referred to as HEW.

[2] The regulations promulgated by HEW originally appeared at 45 C.F.R. Part 86, but were recodified in connection with the establishment of the Department of Education. 45 Fed.Reg. 30802 (1980). See note 1 *supra*. The regulations are now found at 34 C.F.R. Part 106 (1981).

[3] 34 C.F.R. § 106.4 (1981) reads in pertinent part as follows:

> (a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.

In an administrative proceeding before the HEW Civil Rights Reviewing Authority it was held that Hillsdale may be required to execute the Assurance of Compliance as a condition of its students' continued receipt of federal financial assistance. This appeal followed. 20 U.S.C. § 1683 (1976).

I. Introduction

Hillsdale College is a private, nonsectarian, coeducational college located in Hillsdale, Michigan with an enrollment of approximately 1,000 students. Since its founding in 1844, Hillsdale College has refused to accept any federal or state aid. Certain of its students, however, individually secure loans or grants to pay the costs of their education under four federal programs: the National Direct Student Loan ("NDSL") Program,[4] the Basic Educational Opportunity Grant ("BEOG") Program,[5] the Supplementary Educational Opportunity ("SEOG") Program,[6] and the Guaranteed Student Loan ("GSL") Pro-

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[4] 20 U.S.C. §§ 1087aa-1087ff (1976). Under the NDSL Program, loans are made by Hillsdale to its students on the basis of need. The funds are used by the students to pay the costs of education, either by direct payment to Hillsdale (*e.g.*, tuition) or to private vendors (*e.g.*, books, rent for off-campus housing, etc.). In the year ending June 30, 1978, approximately 107 students at Hillsdale College secured approximately $104,000 in such loans. See *Joint Stipulation of Facts, No. 4.*

[5] 20 U.S.C. § 1070a (1976). Under the BEOG Program, students secure grant funds directly from the United States to defray educational costs. In the year ending June 30, 1978, 54 Hillsdale students secured approximately $54,000 in such grants. See *Joint Stipulation of Facts, No. 5.*

[6] 20 U.S.C. §§ 1070b-1070b-3 (1976). Under the SEOG Program, funds allocated by HEW to Hillsdale are awarded by Hillsdale to needy students to defray educational expenses. In the year ending June 30, 1978, approximately 53 students attending Hillsdale College were awarded $37,400. See *Joint Stipulation of Facts, No. 7.*

gram.[7] In the year ending June 30, 1978, approximately one-fourth of Hillsdale's student body received aid under these loan and grant programs.

Title IX, enacted into law on June 23, 1972, is designed to prevent sex discrimination in federally assisted education programs and activities. Section 901(a) of Title IX provides as follows:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681(a) (1976). Section 902 of Title IX, which provides for the enforcement of Section 901, authorizes HEW to issue regulations to implement Section 901 and to enforce such regulations by administrative enforcement proceedings.[8] The ultimate sanction for non-

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[7] 20 U.S.C. §§ 1071-1087-4 (1976). Under the GSL Program, students apply to private lending institutions for loans guaranteed in whole or in part by the United States. The funds are used to defray educational expenses. In the year ending June 30, 1978, 51 Hillsdale students secured approximately $123,806 in GSL loans. See *Joint Stipulation of Facts, No. 6.*

[8] Section 902 of Title IX, 20 U.S.C. § 1682 (1976), reads in part as follows:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant

compliance is the termination of federal assistance to any program in which noncompliance is found. Section 903, 20 U.S.C. § 1683 (1976), provides for judicial review of any department or agency action taken pursuant to Section 902. These sections of Title IX were derived from the virtually identical language of Title VI of the Civil Rights Act of 1964, which prohibits race discrimination in federally assisted programs.[9]

On June 4, 1975, HEW issued final regulations to "effectuate Title IX of the Education Amendments of 1972. . . ." 34 C.F.R. § 106.1 (1981). The portions of the regulations at issue in this case deal with the definitions of "recipient" and "federal financial assistance." Section 106.2(g)(1)(ii) defines "federal financial assistance" to include:

> Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

The term "recipient" is defined in the regulations to mean:

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or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found, or (2) by any other means authorized by law. . . .

[9] 42 U.S.C. § 2000d (1976). Sections 602 and 603 of Title VI are absolutely identical to sections 902 and 903 of Title IX; section 601 is almost identical except that it prohibits discrimination based on "race, color or national origin" whereas section 901 prohibits discrimination based on sex, and section 901 is limited to "any *education* program or activity" whereas section 601 covers "any program or activity" (emphasis added).

> [A]ny State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives *or benefits from such* assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.2(h) (1981) (emphasis added). An exception to this definition is found in 34 C.F.R. § 106.2(g)(5) (1981) which, in accordance with Section 902 of Title IX, exempts financial assistance in the form of contracts of insurance or guaranty from the enforcement authority of HEW.

The regulations, under Section 106.4(a), further provide that each "recipient" of "federal financial assistance," as defined above, must submit to HEW an "Assurance of Compliance" with Title IX, stating that each education program or activity operated by the institution to which the regulations apply will be conducted in compliance with Title IX and the regulations.[10]

Because Hillsdale College refused to execute such an Assurance of Compliance, HEW instituted these proceedings. Hillsdale's basic arguments as to why the order cutting off funds is invalid are as follows. First, it argues that, because it does not operate any "education program or activity receiving Federal financial assist-

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[10] *See* note 3 *supra*. The Assurance of Compliance, HEW asserts, is critical to its effective enforcement of Title IX insofar as it provides a means of monitoring the threshold compliance with the statute by the large number of universities, colleges, schools, and other institutions covered by Title IX. A similar regulatory scheme is employed by the various agencies in charge of enforcing Title VI. *See, e.g.*, 38 C.F.R. § 18.4 (1981) (assurance of compliance required as a condition of receipt of federal financial assistance from the Veterans Administration).

ance," 20 U.S.C. § 1681(a) (1976), it is not a "recipent" of such assistance within the meaning of Title IX and therefore, contrary to the regulations, is not covered by Title IX at all. Stated slightly differently, Hillsdale contends that the receipt by its students of federal financial assistance does not make it, the institution, a "recipient" under Title IX. Second, Hillsdale argues that the federal loans and grants cannot be terminated because of its failure to sign an Assurance of Compliance with Title IX regulations since enforcement under Title IX is "program-specific" and it can be required to assure compliance only as to programs actually receiving federal assistance. Implicit in this argument is the proposition that it is, at the most, subject to regulation under Title IX only as to its administration of the student loan and grant programs. While recognizing that under the Assurance the recipient agrees only to comply with the regulations to the extent applicable to it, Hillsdale points out that it is HEW's very theory that the entire institution is subject to such regulation.[11] Third, Hillsdale argues that termination of federal assistance, under the statute, cannot in any event be done unless there has been a showing of actual sex discrimination in the program receiving federal assistance.

A. The ALJ Decision

The matter was referred to an Administrative Law Judge ("ALJ") upon a joint stipulation of facts and, on August 23, 1978, the ALJ issued his Initial Decision denying HEW's request for an order terminating federal financial assistance to Hillsdale's students.

The ALJ initially found that, under the definitions set forth in the regulations, the payments by HEW to the

[11] Hillsdale also contends that if Title IX is construed to apply to it to the extent urged by HEW, the statute would be unconstitutional. In view of our disposition, we need not consider this contention. *Lynch* v. *Overholser*, 369 U.S. 705 (1967).

students under the NDSL, SEOG, and BEOG programs constituted federal financial assistance received by Hillsdale:

> The financial assistance helps students pay for their education at Hillsdale by defraying their costs of tuition, books, room and board and other expenses incurred in attending Hillsdale. Since funds are provided which Hillsdale would otherwise have to supply from its own resources, the total funds available to Hillsdale to carry on its education programs will also allow students to attend Hillsdale who would otherwise not have the financial means to do so, and so enlarge the population on which Hillside can draw for students.

This finding by the ALJ that Hillsdale was a recipient of federal financial assistance under the regulations and Title IX was held to be "persuasively supported" by the case of *Bob Jones University* v. *Johnson*, 306 F.Supp. 597 (D.S.C. 1974), *aff'd without opinion*, 529 F.2d 514 (4th Cir. 1975. *Bob Jones* arose under Title VI of the Civil Rights Act of 1964 and involved the payment of veterans' benefits to veterans attending Bob Jones University in Greenville, South Carolina. The University, which had a policy of denying admission to unmarried nonwhite students for religious reasons, refused to sign an Assurance of Compliance with Title VI. As a result, all VA assistance to the University was terminated.

The district court in *Bob Jones* upheld the termination, finding the veterans' benefits to be federal financial assistance "received" by the University. 396 F.Supp. at 601-602. In addition, the court held that the veterans' payments were "specifically tied to the beneficiary's participation in an educational program or activity," equating the statutory phrase "program or activity" with the entire institution. *Id.* at 602. Relying on such language, the ALJ found that, insofar as the federal grant and loan monies "received" by Hillsdale were not earmarked

for specific programs but were utilized for general educational purposes, the institution *as a whole* was being financially supported through the payment made by the students under the federal programs. Consequently, the ALJ concluded, "it is the entire entity, Hillsdale College, which must vouch that each education program of activity operated by it will be operated in compliance with Title IX."

Although the ALJ found Hillsdale, as an institution, to be a recipient of federal financial assistance by virtue of the student aid programs, the College was not required by the ALJ to sign the Assurance of Compliance. The ALJ noted that the Assurance of Compliance imposed a contractual duty on Hillsdale to comply with Title IX and Title IX regulations. Because several courts, including this court, had held that the regulations found at 34 C.F.R. §§ 106.51-106.61 (1981), relating to the prohibition of sex discrimination in employment, were invalid,[12] the ALJ held that under such circumstances, it would be an abuse of discretion and arbitrary and capricious to grant the relief requested by HEW.[13]

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[12] See *Seattle University* v. *HEW*, 621 F.2d 992 (9th Cir. 1980), *vacated sub nom. United States Dept. of Educ.* v. *Seattle Univ.*, 456 U.S. ——, 102 S.Ct. 2264 (1982); *Dougherty Cty. School System* v. *Harris*, 622 F.2d 735 (5th Cir. 1980), *vacated sub. nom. Bell* v. *Dougherty Cty. School System*, 456 U.S. ——, 102 S.Ct. 2264 (1982); *Romeo Community Schools* v. *HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Junior College Dist.* v. *Califano*, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Isleboro School Comm.* v. *Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979). These decisions have been overturned by the Supreme Court in *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. ——, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). See notes 15-16 *infra* and accompanying text.

[13] In addition, the ALJ held that the GSL Program, insofar as it involves the guarantee of loans made by private financial institutions, falls within the Section 902 exemption for contracts of insurance or guaranty.

B. The Reviewing Authority Decision

HEW and Hillsdale both filed exceptions to the ALJ's Initial Decision with the HEW Reviewing Authority, Civil Rights. On October 25, 1979 the Reviewing Authority denied Hillsdale's exceptions and granted HEW's exceptions in part, upholding the ruling of the ALJ that the Title IX regulations deeming Hillsdale to be a recipient of federal financial assistance are not in excess of the statutory authority granted HEW by Congress. The Reviewing Authority, however, rejected the ALJ's holding that Hillsdale cannot be required to sign the Assurance of Compliance in light of the fact that several courts had found part of the Title IX regulations to be invalid. By executing the Assurance of Compliance, the Reviewing Authority held, Hillsdale would bind itself to comply only with lawful regulations.[14]

C. North Haven Bd. of Educ. v. Bell

The Supreme Court, subsequent to the decisions of the ALJ and the Reviewing Authority, held in *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. ——, 102 S.Ct. 1912, 72 L.Ed.2d 299, 305 n.4 (1982), that the employment practices of educational institutions are subject to Title IX regulation provided the other statutory requirements are met.[15] *North Haven* thus removes the underlying basis

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[14] The Reviewing Authority also reversed the ALJ's determination that the GSL Program does not constitute federal financial assistance. The Program, insofar as the interest payments thereunder are direct and immediate disbursements of federal funds aiding the college in the same manned as the funds disbursed under the NDSL Program, was held to go beyond the terms of the contract of insurance or guaranty exemption found in section 902.

[15] The Court concluded, after an examination of the legislative and post-enactment history of Title IX, that Section 901(a)'s directive that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance," while not expressly referring

for the ALJ's determination that Hillsdale cannot be required to execute the Assurance of Compliance, which was that signing the Assurance would compel the College to abide by the unlawful employment regulations.

In the course of upholding the validity of the employment regulations, however, the Court stressed the "program-specific" nature of Title IX, holding that "an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902." *Id.* at ——, 72 L.Ed.2d at 317-318.[16] The Court, nevertheless, expressly declined to define the term "program." *Id.* at ——, 72 L.Ed.2d at 319.

II. Issues on Appeal

As previously stated, Hillsdale College is presently before this court seeking review of the Order of the HEW Reviewing Authority requiring it to execute the Assurance of Compliance in order to remain eligible for federal financial assistance to its students. Under the facts presented, two major issues are before this court: (1) whether the regulations, by deeming Hillsdale College to be a "recipient" of federal financial assistance subject to Title IX by virtue of the receipt of its students of federal grants and loans, exceed the statutory authority granted HEW by Congress, and (2) whether HEW in any event can insist on the excution of the Assurance of Compliance

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to employees, does encompass employees as well as students of educational institutions. 72 L.Ed.2d at 307-318.

[16] The Court held that the employment regulations were not inconsistent with Title IX's program-specific character because, although they spoke in general terms of the employment practices of educational institutions, they were limited by 34 C.F.R. § 106.1 (1981), which states that the purpose of the regulations is "to effectuate Title IX . . . [,] which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education *program or activity* receiving Federal financial assistance . . . ." (emphasis added). *North Haven*, 72 L.Ed.2d at 318-319.

as a condition precedent for the continuation of federal student assistance programs at Hillsdale College.[17] We determine that Hillsdale is a "recipient" within the meaning of Title IX but that the regulations are invalid to the extent that they purport to subject Hillsdale College as an institution to the strictures of Title IX. Specifically, we conclude that the regulations, as applied in this instance, contravene the program-specific nature of Title IX by equating the statutory phrase "education program and activity" with the educational institution itself. We reach this conclusion after examining the statutory language of Title IX, its legislative history, and the relevant case law.

III. Statutory Language of Title IX

The two core provisions of Title IX, Section 901 and 902, both contain express references to the program-specific focus on the statute. As noted by the Supreme Court in *North Haven*, Section 901 sets forth the statute's program-specific prohibition of gender discrimination, while Section 902 relates to enforcement, providing for termination of federal funds or denial of future grants as the ultimate sanction for noncompliance so long as the termination or refusal "is limited in its effect to the particular program, or part thereof, in which noncompliance has been so found. . . ." 20 U.S.C. § 1682 (1976). See *North Haven*, 72 L.Ed.2d at 304. The Court in *North Haven* relied on the existence of program-specific language in both the funding termination provision of Section 902 and the portion of Section 902 authorizing the issuance of implementing regulations[18] to reject the implicit view of the lower court that HEW's authority to issue regulations is broader than its enforcement au-

[17] A third issue before this court is whether or not the GSL Program falls within the exemption found in Section 902 for contracts of insurance or guaranty. The holding of this case, however, makes it unnecessary to reach this issue.

[18] See note 8 *supra*.

thority, noting that "it makes little sense to interpret the statute . . . to authorize an agency to promulgate rules it cannot enforce." *Id.* at ——, 72 L.Ed.2d at 318.

Although stressing the requirement that Title IX regulations conform to the program-specific nature of the statute, the Supreme Court in *North Haven*, as previously stated, expressly declined to define the term "program." It is the position of HEW that, when an educational institution "receives" federal financial assistance by virtue of the receipt by its students of federal grants and loans, the *entire* educational institution constitutes a single "education program or activity." 20 U.S.C. § 1681 (a) (1976). Specifically, HEW asserts that since "significant" portions of the loan and grant monies provided to the students at Hillsdale are used to pay tuition, which generally supports the College as a whole, the College itself is the relevant "education program and activity" receiving federal financial assistance and thus the *entire* College may be regulated under Title IX consistently with the statute's program-specific mandate.

An examination of the statutory language of Title IX does not bear out HEW's proposed expansive reading of the phrase "education program or activity." Initially, it should be pointed out that neither the term "educational institution" nor any equivalent term appears in Title IX's general prohibition, implementation, or enforcement provisions. Instead, in each instance, the phrase "education program or activity" is used. The term "educational institution" does however appear throughout the statutory exceptions to the general prohibition against sex discrimination set out in Section 901,[19] and is defined at Section 901(c) as follows:

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[19] The exceptions to the general prohibition against discrimination set forth at Section 901(a)(1-9), 20 U.S.C. § 1681(a)(1-9) (1976), include, *inter alia*, educational institutions of religious organizations with contrary religious tenets, educational institutions training individuals for military services or the merchant

> (c) For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

20 U.S.C. §1681(c) (1976). In *Rice* v. *President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 50 U.S.L.W. 3838 (U.S. April 20, 1982), the First Circuit held that "[t]he precision with which Congress defined educational institution strongly indicates that it did not equate education program with educational institution." 663 F.2d at 338. The appellant in *Rice*, a female law student at Harvard Law School, had brought suit under, *inter alia*, Title IX claiming sex discrimination in the awarding of grades at Harvard Law School. Because she had not specified any federally funded program in which she suffered discrimination on the basis of sex, the appellant argued that Harvard Law School should be deemed the relevant "education program" by virtue of its status as a recipient of federal funds for its work study program. No allegation of discrimination, however, was made concerning the School's handling of the work study program.

The court held that the appellant failed to bring herself within the protection of Title IX. Finding that Congress had "obviously recognized that an educational institution offers a number of education programs and activities," the court concluded that "the only meaningful

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marine, public educational institutions with traditional and continuing admissions policies, father-son or mother-daughter activities at educational institutions, scholarships awarded in "beauty" pageants by institutions of higher education, and, with regard to admissions, certain specified educational institutions and institutions commencing planned changes in admissions policies.

interpretation of [20 U.S.C.] § 1681(a) is that it prohibits sex discrimination in a federally funded education program offered by an educational institution." 663 F.2d at 338.

IV. Legislative History

The First Circuit's conclusion in *Rice* that Congress, in passing Title IX, did not equate "education program" with "educational institution" is supported by an examination of the statute's legislative history. The legislative history of Title IX and Title VI, upon which Title IX is based,[20] supports the position taken by Hillsdale that Congress adopted a programmatic as opposed to an institutional approach to the problem of sex discrimination in education.

Title IX originated in a floor amendment to S. 659, 92d CONG., 1st SESS. (1971) (Education Amendments of 1971) sponsored by Senator Bayh. As originally introduced, Senator Bayh's amendment read as follows:

> No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of or be subject to discrimination under any program or activity conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance for any education program or activity. . . .

117 CONG. REC. 30156 (1971). This amendment embodied an institutional aproach as it would regulate *all* operations of an educational institution which received federal assistance for *any* of its programs or activities. The amendment, however, was ruled to be nongermane to the bill under consideration and defeated. 117 CONG. REC. 30415 (1971).

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[20] See note 9 *supra* and accompanying text.

In February 1972, the provision ultimately enacted as Title IX was introduced in the Senate by Senator Bayh during debate on the Education Amendments of 1972. 118 CONG. REC. 5803 (1972). The institutional approach of the original proposal was replaced by the program-specific language presently contained in Sections 901 and 902. No explanation or discussion was given for the change of approach.[21] The Senate adopted the amendment and, on June 8, 1972, Congress passed the provisions as Title IX of the Education Amendments of 1972. The measure was signed into law by the President on June 23, 1972.

The legislative history of Title IX is sparse. Because the statute is a result of a floor amendment, there are no committee reports discussing its provisions.[22] The Su-

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[21] In *Haffer* v. *Temple University*, 524 F.Supp. 531 (E.D.Pa. 1981), *appeal docketed*, No. 82-1049 (3rd Cir. Nov. 13, 1981), the court cited the lack of explanation or discussion of the wording change between amendments in support of its view that the "history of the bill through enactment . . . is ambiguous." *Id.* at 534.

[22] The Supreme Court in *North Haven* noted that, because of the lack of committee reports discussing the provisions of Title IX, the remarks of Senator Bayh, as sponsor of the language ultimately enacted, are the "only authoritative indications of congressional intent regarding the scope of §§ 901 and 902." *North Haven*, 72 L.Ed.2d at 311. Unfortunately, Senator Bayh did not specifically address the issue at hand during the course of the Congressional proceedings. The issue was presented to Senator Bayh, however, during the hearings held to determine if the proposed regulations "as they are written are consistent with the law, or whether they should be returned to [HEW] for redrafting until they are consistent with the law from which they must draw their authority." *Hearings on Title IX Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor*, 94th CONG., 1st SESS. 97 (1975) (remarks of Rep. O'Hara). Senator Bayh's remarks at the hearing are in pertinent part as follows:

> REP. QUIE: I am talking about whether the Department of Health, Education, and Welfare has overstepped its bounds in claiming that an institution is conducting a program or activity

preme Court in *North Haven*, however, found the shift in approach from the 1971 amendment to the 1972 amendment to be significant:

> Title IX's legislative history corroborates its general program-specificity. Congress failed to adopt proposals that would have prohibited *all* discriminatory practices of an institution that receives federal funds. See 117 Cong. Rec. 30155-30157, 30408 (1971) (Sen. Bayh's 1971 amendment) ....

North Haven, 72 L.Ed.2d at 318 (emphasis in the original).

It thus appears clear that Title IX as enacted adopts the programmatic as opposed to institutional approach to discrimination on the basis of sex in education. This conclusion, however, is not dispositive of the issue of whether the regulations are inconsistent with the program-specific nature of Title IX to the extent they deem Hillsdale College to be a recipient of federal financial assistance by virtue of the federal aid provided its students. Although conceding that the effect of its assertion that Hillsdale College itself is the relevant "education program or activity" is to subject the entire College to regulation, HEW contends that such a position is not institutional, since it does not attempt to regulate programs not receiving federal funds, as the original version of Title IX attempted, but instead is programmatic, with the entire

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financed by the Federal Government if a student is receiving Federal aid to attend that program or those programs.

SEN. BAYH: You know, I just don't know. I would have to look that up if you like; perhaps you know. That is not generally the kind of penalties that are meted out, as I am sure you realize.

REP. QUIE: But I have heard it claimed that that is one of the reasons why they have jurisdiction.

SEN. BAYH: I have not.

Id. at 181.

College constituting the relevant "education program." Hence it is necessary to determine whether Congress intended entire educational institutions to be regulated under the phrase "education program or activity."

As previously noted, there is no explicit language in Title IX which supports HEW's position that an entire institution can constitute an "education program or activity." See *Rice* v. *President and Fellows of Harvard College, supra.* As noted by one commentator, the term "program" was used in the Congressional debates preceding passage of Title IX "to refer not to the total program of an educational institution but to smaller-scale activities within the institution."[23] In *Board of Public Instruction* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969), the Fifth Circuit similarly relied on the legislative history of Title VI to reject HEW's assertion that the term "program" in Section 601 of Title VI, 42 U.S.C. § 2000d (1976), referred to general categories such as "school programs." The Court in *Finch* instead equated "program" with "federal grant statute," relying on the manner in which the term "program" was used during the debates on Title VI.[24]

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[23] Comment, *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U.L.Rev. 133, 181 (citing 117 Cong.Rec. 39256 (1971) (Representative Steiger); *id.* (Representative Waggonner); *id.* at 30406 (Senator Dominick)).

[24] Comment, note 22 *supra*, at 181-182. The court cited the repeated references to particular federal programs in support of its conclusion:

> An even more substantial objection to HEW's interpretation of the term "program" is provided by the use of that term during Congressional debates on the statute and by HEW's own use of the term in the administrative regulations issued thereunder. In the Senate where the program limitation was initiated, reference was frequently made to the school lunch program, 110 Cong.Rec. 7101 (1964), to the agricultural extension program for home economics teachers, 110 Cong.Rec. 13126

In short, we find that the legislative histories of Title VI and Title IX reveal no indication that Congress contemplated that an entire educational institution could constitute a single "program or activity." We further find that the position asserted by HEW is inconsistent with the program-specific nature of Title IX insofar as its practical effect would be to circumvent the programmatic focus of the statute and adopt the institutional approach.

V. Case Law

The inconsistency between equating "educational institution" with "education program or activity" and the program-specific nature of Title IX was discussed in *Bennett* v. *West Texas State University*, 525 F.Supp. 77

(1964), to the farm-to-market road program, 110 Cong.Rec. 13331 (1964), to aid for vocational agriculture teaching, 110 Cong.Rec. 13126 (1964), and to aid to impacted school districts, 110 Cong.Rec. 7100 and 13126 (1964). Senator Eastland went so far as to introduce in the Congressional Record a long list of the federal programs to which the cutoff provision was applicable, 110 Cong.Rec. 8359-8361 (1964), as did Congressmen Poff and Cramer in the House. 1964 U.S. Code Cong. & Adm. News, pp. 2470-2473. HEW in issuing regulations to implement the cutoff provision has followed a similar procedure. See 45 C.F.R. § 80.2 and 45 C.F.R. § 80.13, Appendix A. *All of these lists refer to particular grant statutes such as those before us, not to a collective concept known as a school program or a road program. Taken together they clearly contradict the notion that Congress intended the collectivization of all school subventions under the single rubric: "program or part thereof."*

414 F.2d at 1077 (emphasis added). In *Romeo Community Schools* v. *United States Dept. of Health, Education, and Welfare*, 438 F.Supp. 1021 (E.D.Mich. 1977), aff'd, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979), the district court relied on *Finch* to reject HEW's contention that the term "program or activity" as used in Section 901 refers to the entire operation of the educational institution. 438 F.Supp. at 1033-1034 n. 18. The court characterized the position of HEW as a "novel and protean interpretation of a well-established statutory term. . . ." *Id.*

(N.D. Tex. 1981), *appeal docketed*, No. 81-1398 (5th Cir. Aug. 28, 1981). *Bennett* involved allegations by female students of West Texas State University that various policies and practices of the University discriminated against women on the basis of sex by denying women equal opportunities in the University's intercollegiate athletic program in violation of Title IX. The University contended, and the district court held, that the regulations exceeded the statutory authority granted under Title IX to the extent they purported to apply to the University's intercollegiate athletic program irrespective of the absence of direct federal financial assistance to that specific program. 525 F.Supp. at 78-80.[25] In addition, the district court held in *Bennett* that the University's athletic program did not receive *direct* federal financial assistance by virtue of the fact that University students received veterans' benefits, BEOG grants, work study money, and other federal financial aid. The plaintiffs' argument, identical to the argument raised by HEW in the instant case, was that the University's athletic program received federal financial assistance because the University received tuition from students that was supplied as grants or loans under the federal programs. The court's rationale for rejecting this argument is equally applicable to the case at hand:

> Plaintiffs' argument that such aid constitutes a direct benefit to the athletics programs is not well-taken. All types of federal aid enumerated by the

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[25] See also *Othen* v. *Ann Arbor School Bd.*, 507 F.Supp. 1376 (E.D. Mich. 1981), *appeal docketed*, No. 81-1259 (6th Cir. April 22, 1981) (Title IX applies only to the specific class of educational program or activities which receive direct federal financial assistance); *cf. Hafer* v. *Temple University*, 524 F.Supp. 531 (E.D.Pa. 1981), *appeal docketed*, No. 82-1049 (3rd Cir. Nov. 13, 1981) (university's intercollegiate athletic program, although not receiving federal funds directly, is subject to Title IX because the federal funds received elsewhere in the institution indirectly assist the athletic program).

> Plaintiffs are general and nonspecific, and such aid is indirect by nature. The type of assistance relied on by Plaintiffs results in some benefit, however remote and indirect, to every program at West Texas State University. *Were the Court to adopt Plaintiffs' argument, the programmatic construction of Title IX would be rendered nugatory, because every program or activity at the university would be subject to Title IX.* The Act itself compels a different conclusion.

Id. at 80-81 (emphasis added).[26] Under the position taken by the plaintiffs in *Bennett* and HEW in the instant case, every program or activity of an educational institution that accepts students who receive federal financial assistance would be subjected to regulation under Title IX. If discrimination is found in a particular program or activity of the institution, such as the athletic program or the math department, the remedy, as sought in this instance by HEW, would be to terminate *all* student federal financial assistance. For the reasons stated herein, we find HEW's position to be inconsistent with the program-specific language of Sections 901 and 902 of Title IX. We further find that, to the extent the regulations adopt and effectuate HEW's position, they are in excess of statutory authority.

HEW and the Reviewing Authority rely primarily on the case of *Bob Jones University* v. *Johnson*, 390 F.Supp. 597 (D.S.C. 1974), *aff'd without opinion*, 529 F.2d 514 (4th Cir. 1975) in support of their position.[27] The court

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[26] The district court in *Haffer, supra*, reached the opposite conclusion, holding as an alternative basis for its decision that the University's athletic program received *direct* federal financial assistance by virtue of (1) work study funds provided to students and employees working in the athletic program, (2) BEOG, SEOG, NDSL, GSL, and work study funds received by University intercollegiate athletes, and (3) federal funds provided to finance buildings used by the athletic program. 524 F.Supp. at 540.

[27] HEW Secretary Weinberger indicated during the hearings on the proposed regulations that the agency was "bound" by *Bob Jones*

in Bob Jones, as previously noted, equated the statutory phrase "program or activity" found in Title VI with the entire University in holding that the veterans' benefits received by students at the University were "specifically tied to the beneficiary's participation in an educational program or activity." 396 F.Supp. at 602. As a result, the order of the Veterans Administration terminating the right of eligible veterans seeking education at Bob Jones University to receive veterans' benefits was affirmed.

We decline to follow the language in *Bob Jones* that an entire institution may be deemed the relevant "program or activity" to the extent that the language would purport to cover the circumstances of the case at hand. Two peculiar features of *Bob Jones* make it distinguishable from the instant case.

One factual distinction of *Bob Jones* is that it involved an admittedly discriminatory admission policy which served to deny entrance to the University to unmarried nonwhites. In *Othen* v. *Ann Arbor School Bd.*, 507 F.Supp. 1376 (E.D. Mich. 1981), *appeal docketed*, No. 81-1259 (6th Cir. April 22, 1981), the district court found that the court in *Bob Jones* did not have to decide which University programs or activities were racially discriminatory because the University's admissions policy "tainted" all programs:

> Racial discrimination respecting acceptance or admission into educational institutions permeates all programs and activities within those institutions. Once racially discriminatory admission policies have been found to exist, the taint of racial discrimination affects all programs and activities within the particular institution. Therefore, the courts which have decided suits brought under Title VI did not have to

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and its interpertation that student assistance constitutes federal financial assistance to the programs of an institution. *Hearings on Title IX*, note 22 *supra*, at 481-482.

> carefully focus upon the institutional/programmatic conflict which is now squarely before this court.

507 F.Supp. at 1387.[28] In contrast, HEW argues here that the programs and activities of Hillsdale College may be subjected to Title IX because student federal financial assistance is to pay tuition, which in turn flows to all operations of the College. There is no allegation that the admissions policy at Hillsdale discriminates on the basis of sex; in fact, there is no allegation that Hillsdale has discriminated on the basis of sex in any manner.

A second feature of *Bob Jones* which distinguishes it from the present case concerns the constitutional dimension of the decision. The court, after noting that "[*e*]*ach time the VA approves an application for benefits to be used at Bob Jones, it extends a benefit to whites which it cannot grant to some blacks*," held that "the federal government cannot, consistent with the Due Process Clause of the Fifth Amendment, provide direct grants-in-aid to public or private entities which discriminate on the basis of race. . . ." 396 F.Supp. at 608 (emphasis in original). Hence the decision in *Bob Jones* may fairly be read to have a constitutional underpinning above and beyond its statutory basis. See *Othen, supra*, at 1389. The position of HEW in the present case, in contrast, must rest on the statutory language of Title IX.

In *Grove City College* v. *Bell*, —— F.2d —— (No. 80-2383, 3rd Cir., August 12, 1982), which raised the same issue as that presented here, the majority of the panel held that under Title IX the entire college is a "program" and that, by virtue of the receipt by students of federal loans and grants which benefits the college, the college may properly be required to execute an Assurance of Compliance. This opinion relies in substantial measure on

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[28] *Cf. Haffer, supra*, at 539 (disagrees with *Othen* that Title VI discriminatory admissions cases did not have the institutional/programmatic dichotomy squarely at issue).

post-enactment legislative history. We disagree with the holding in *Grove City* for the reasons heretofore indicated. On the contrary, we are of the view that the "program," within the meaning of Title IX, is the federal loan and grant program for students. The reasoning of the majority in *Grove City* would equally apply if the federal government subsidized the athletic program at a college allowing the college to use gate receipts to, for example, supplement faculty salaries and to create scholarships. We do not believe that Congress intended, in enacting Title IX, to authorize HEW pervasively to regulate entire colleges and universities because federal money benefits the entire institution.[29] Under the majority opinion in *Grove City*, the "program-specific" limitation set out by the Supreme Court in *North Haven* loses all of its practical meaning.

The concurring judge (Judge Becker) in *Grove City* thought that the majority opinion was too broadly based, contending that the only issue presented was whether the college could be required to execute the Assurance of Compliance. Judge Becker then asserts that the Assurance is itself program-specific, as is required by *North Haven*, because it applies, by its terms, only to an education program or activity for which the applicant receives or benefits from federal financial assistance. (Slip op. at 45). Thus Judge Becker concludes that the regulation

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[29] The regulations specify, in part, the high schools where Hillsdale may recruit students for admission (34 C.F.R. § 106.23), the literature that Hillsdale may provide to the students about the college (34 C.F.R. § 106.9), the tests which Hillsdale may require the students to take as a condition of admission (34 C.F.R. § 106.21 (2)), how Hillsdale may use its own funds to aid the students (34 C.F.R. § 106.37), the students' access to course offerings (34 C.F.R. § 106.34), the manner in which the student is housed, whether on or off campus (34 C.F.R. § 106.32), the health services provided to students (34 C.F.R. § 106.39), the students' extracurricular activities (34 C.F.R. § 106.31(a)) and student athletic participation (34 C.F.R. § 106.41).

requiring the Assurance is valid because the Assurance is limited to programs receiving benefits from the federal government. The difficulty with Judge Becker's view is that it is HEW's very position that the entire college is a program and that by executing the Assurance, the college agrees to comply with regulations as they apply to the entire institution. Simply stated, it appears to us that it would be anomalous to hold that the college may be required to execute the Assurance because it is so limited by its terms when HEW construes the Assurance and its regulations to apply to the college as an institution, a position that is, in our view, not supportable under Title IX.

VI. CONCLUSION

We agree with Hillsdale in part and HEW in part.

1. We agree with HEW that funds may be cut off without a finding that a college is actually discriminating on the basis of sex. Section 902 authorizes HEW to issue regulations to effectuate section 901 and further provides that compliance with the regulations may be enforced by cutting off of federal funds. The statute does *not* provide that funds may be cut off only upon a finding of actual discrimination.

2. We further agree with HEW that Hillsdale is a "recipient" within the meaning of section 901 and that, provided that the "program-specific" limitation in Title IX is met, it is subject to regulation.

3. We agree with Hillsdale's alternative contention that the entire college, as an institution, is not a "program" within the meaning of Title IX and that the "program" involved here is the student loan and grant program. Thus we agree that only the student loan and grant program is subject to Title IX regulation.

4. We agree with Hillsdale that the regulation requiring it to execute the Assurance of Compliance as a

condition for its students receiving loans and grants is, as it is applied here, an invalid regulation. This is true because the regulation and the Assurance, as interpreted and applied by HEW, cover the entire college and are not limited to the student loan and grant program.

For reasons stated herein it is ORDERED that the reviewing authority's order be and the same is hereby Reversed.

EDWARDS, Chief Circuit Judge. Respectfuly, I dissent. This case involves interpretation of one of two principal pieces of legislation [1] which Congress has yet adopted in order to grant equal rights to women. I would not give it the very narrow interpretation which is to be found in the majority opinion.

There is, of course, no doubt that reluctance (or worse) in interpretation of both constitution and law has greeted efforts to achieve equal rights for women throughout the history of this nation. Yet in this statute, Congress clearly intended to turn its back on that discreditable past. And in two important cases, the Supreme Court (by breadth of interpretation of Title IX) and the Third Circuit (in a decision directly on point) have done likewise. *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 102 S.Ct. 1912, 72 L.Ed. 299 (1982); *Grove City College* v. *Bell*, 687 F.2d 689 (3rd Cir. 1982). I regret that my colleagues elect not to follow these cases.

Equality of all "citizens" or "persons" before the law is one of the main themes of the Constitution of the United States. It has, however, taken a long time in the history of this country for women to be recognized as either "persons" or "citizens" in a constitutional and legal sense. And indeed that recognition is still not as complete in Supreme Court case law as it is in the case of black males.

Prior to the adoption of the Constitution, Abigail Adams in 1777 wrote to her husband John:

> In the new code of laws which I suppose it will be necessary for you to make, I desire you would remember the ladies and be more generous and favorable to them than your ancestors. Do not put such

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[1] Directly involved is Title IX, 20 U.S.C. § 1681-86 (1978). The other Act is Title VII, Equal Employment Opportunity Act, 42 U.S.C. §§ 2000(e) *et seq.* (1981). *See also* the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1978).

> unlimited power into the hands of the husbands. Remember, all men would be tyrants if they could. If particular care and attention is not paid to the ladies, we are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation.

E. Flexner, Century of Struggle 15 (1974) quoting Adams, *Familiar Letters*, 149050. In the original Constitution, adopted at Philadelphia and ratified in 1787, Article IV, § 2, Clause 1 reads "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." Despite Abigail's entreaties, however, the "ladies" went unremembered. Just as blacks of that day whether freed or slave were not considered citizens for purpose of that grant of equality, so too, by common understanding, were women excluded, albeit, not by any specific constitutional language. When four years later the new country enacted Amendment V of the Bill of Rights, it decreed as to all persons in the nation "no person shall be deprived of life, liberty or property without the due process of law." While the rights of women to due process of law in matters involving charges of crime or cases involving disputes over property were gradually established (largely as a result of the common laws' impact on the laws of the various states) they were still not considered "persons" or "citizens" in a full constitutional sense.

Women were *called* "persons" and "citizens" by the Court, but they were still not afforded full constitutional rights, particularly political rights, belonging to male persons or male citizens. For example the *Dred Scott* decision described the woman as "citizen" and referred to her as a person but treated her as a political eunuch. In the words of that Court, "Undoubtedly, a person may be a citizen, that is a member of the community who form the sovereignty although he exercises no share of the political power, and is incapacitated from holding par-

ticular offices. Women and minors, who form a part of the political family cannot vote . . . yet they are citizens." *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 422 (1856).

In 1868, after the dreadful conflict of the Civil War and after the abolition of slavery, the fourteenth amendment was adopted and ratified. It read:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of any citizen of the United States nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction, the *equal protection of the laws*." U.S. Constitution, Amendment XIV, § 1 (Emphasis added).

On the face of this amendment, it would seem logical that women born or naturalized in the United States, were by virtue of the fourteenth amendment, citizens of the United States and of the states wherein they reside and consequently, that they could not be denied the equal protection of the laws.

Perhaps the most fundamental of the laws, however, were those which gave citizens the right to vote, yet the Supreme Court in 1874 had no trouble saying that no portion of the fourteenth amendment served to extend voting rights to women since they had never before had them. *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162 (1874). Of course the fourteenth amendment could likewise have been regarded as a grant of voting rights to the freed slaves. But that proposition seems to have been so far from public consciousness that in 1870 the fifteenth amendment was drafted and ratified in order specifically to accomplish that objective as to black males. The fifteenth amend-

ment reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude." Efforts to add "sex" as a forbidden basis for exclusion from the right to vote were brushed aside, and the fifteenth amendment made no reference to any rights that women, black or white, might have.

In fact women were denied the right to vote in both local, state and national election until the great women's suffrage movement secured another constitutional amendment.[2] It was adopted and ratified in 1920. The nineteenth amendment reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

The Constitutional Convention and the Congresses involved in these enactments were, of course, markedly male. So, too, was the Supreme Court until 1981 when Justice Sandra Day O'Connor was sworn in. As stated earlier although Supreme Court *theory* recognized women as "persons" and "citizens" its early decisions did not give that recognition much effect.

In *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1873), the Supreme Court held that Illinois could deny Bradwell the right to practice law solely because she was a woman. In *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162 (1874), the Supreme Court held that the states could deny women the right to vote. In *Goessart* v. *Cleary*, 335 U.S. 464, the Supreme Court held Michigan could prohibit employment of women as bartenders. In *Hoyt* v. *Florida*, 368 U.S. 57 (1961), the Supreme Court held that Florida could exclude women from jury service unless (unlike men), they voluntarily registered their availability.

In recent years a trend in the direction of equal rights for women has been recorded. Congress in 1964 adopted

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[2] E. FLEXNER, CENTURY OF STRUGGLE (1974).

Title VII designed to give women equal employment opportunities. In 1972 it adopted the statute currently before us designed to give women equal educational opportunities.

In recent years also the Supreme Court's attitude toward women's rights to equality before the law has altered. In *Reed* v. *Reed*, 404 U.S. 71 (1971), the Supreme Court held that state laws could not prefer males over equally qualified females for the position of administrator of a decedent's estate. In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), the Court [3] held that a female member of the military could not be denied the fringe benefits of housing alowance and medical benefits for her spouse given to male soldiers. In *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974), the Court [4] held that pregnant public school teachers could not be forced out of work at a fixed stage of pregnancy well in advance of term, nor be forced to wait to return to the jobs until a fixed period had elapsed. In *Taylor* v. *Louisiana*, 419 U.S. 552 (1975), the Court held that laws which exclude women from jury service were invalid. In *Orr* v. *Orr*, 440 U.S. 268 (1979), the Court held that a statutory scheme providing husbands but not wives may be required to pay alimony was unconstitutionally discriminatory. These examples of recent cases seem to make it clear that governmental authority may no longer be used to accord women the inferior status they held under common law and past constitutional interpretation.[5]

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[3] In the *Frontiero* decision the four-vote plurality opinion declared that gender based classifications were "inherently suspect" and therefore subject to "strict judicial scrutiny." 411 U.S. at 682. This standard of review, however, has not yet received the fifth vote.

[4] Justice Stewart's opinion for the Court granted relief not on an equal protection basis but rather on due process grounds.

[5] In a series of articles Ruth Bader Ginsberg has succinctly delineated the constitutional evolution of the equality principle as

This thumbnail sketch of women's battle for equality before the law of this country from Abigail Adams to Sandra O'Connor is designed to point out that women's rights to equal treatment under the Constitution of the United States are long overdue. When a heavily male dominated Congress finally came around to adopting two important pieces of legislation obviously designed to give women equal rights in education and employment, one of which is before this Court in this case, it ill-behooves the courts to approach such overdue remedial legislation with hostility.

Turning directly to this case, the key sentence of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-86 is: "No person in the United States shall, on the basis of sex, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. . . ."

It should be noted at the outset that no charge that Hillsdale has actually discriminated against women is involved in this case. Hillsdale has simply refused to state that it will follow the law set forth above.

Since I agree with two of Judge Brown's conclusions for the reasons stated in his opinion, I can shorten this dissent. My concurrence runs to the following declaration of the majority:

> 1. We agree with HEW that funds may be cut off without a finding that a college is actually discriminating on the basis of sex. Section 902 authorizes HEW to issue regulations to effectuate section 901

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applied to women while commenting upon gender protectionism. *Sex Equality Under the Fourteenth Amendment and the Equal Rights Amendment*, 1979 Wash. U.L.Q. 161 (1979); *Sex Equality and the Constitution*, 52 Tul. L. Rev. 451 (1978); *Benign Classification in the Context of Sex Discrimination*, 10 Conn. L. Rev. 813 (1978); *Gender and the Constitution*, 44 Cin. L. Rev. 1 (1975).

and further provides that compliance with the regulations may be enforced by cutting off federal funds. The statute does *not* provide that funds may be cut off only upon a finding of actual discrimination.

2. We further agree with HEW that Hillsdale is a "recipient" within the meaning of section 901 and that . . . it is subject to regulation.

As to the following conclusions of Judge Brown, I am in disagreement:

3. We agree with Hillsdale's alternative contention that the entire college, as an institution, is not a "program" within the meaning of Title IX and that the "program" involved here is the student loan and grant program. Thus, we agree that only the student loan and grant program is subject to Title IX regulation.

4. We agree with Hillsdale that the regulation requiring it to execute the Assurance of Compliance as a condition for its students receiving loans and grants is, as it is applied here, an invalid regulation. This is true because the regulation and the Assurance, as interpreted and applied by HEW, cover the entire college and are not limited to the student loan and grant program.

Educational Activities as a Title IX "Program"

Federal funding which is involved in this appeal consists of the receipt by Hillsdale of funds for the operation of the college from student fees paid as a result of four separate federal grant programs. These are the National Direct Student Loan Program, hereinafter to be referred to as NDSL, 20 U.S.C. § 1087aa *et seq.*; the basic Educational Opportunity Grant Program, hereinafter BEOG, 20 U.S.C. § 1070; the Supplemental Educational Opportunity Grant Program, hereinafter SEOG; 20 U.S.C. 1070(b) and the Guaranteed Student Loan Program, here-

inafter GSL; 20 U.S.C. § 1071 *et seq.* Under two of these programs, NDSL and SEOG, the Department provides funds directly to Hillsdale College. The College then distributes the funds in the form of scholarships to qualified students. Portions of or all of such scholarship funds are then paid to the College by the students as tuition, room and board, etc. Under the BEOG Program, HEW funds are provided directly to eligible students and are subsequently paid to Hillsdale for tuition, room and board, etc. The GSL Program is distinct from the other three. Under it, students apply for low-interest loans from private lending institutions. The loans are guaranteed in whole or in part by the United States Government which pays interest on the loans throughout the student's education.[6]

All of the programs referred to above require that Hillsdale certify that the student who is the ultimate recipient is enrolled in college. Under two of the programs, NDSL and SEOG, HEW pays the funds directly to Hillsdale which then distributes the federal subsidies to qualified students. Under BEOG, HEW funds are provided directly to eligible students who in turn use them to defray their college expenses. HEW advises that in the year ending June 30, 1978 approximately one-fourth of the Hillsdale student body received aid under these various programs.

It seems clear to me that each of these programs provides funds which when paid to the college are used for the general support of the educational program of the college as a whole.

Section 1681(a) of Title IX provides as follows: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational

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[6] Since § 1685 of the statute exempts from remedy programs affected by "contract of insurance" or "guaranty," this opinion does not rely upon the GSL funding in affirming the Secretary.

program or activity receiving Federal financial assistance . . . ." Under the circumstances outlined above, it seems obvious to me that Congress intended for its prohibition on sex discrimination to apply to a college like Hillsdale when it was "receiving Federal financial assistance" in the fashion Hillsdale is receiving such.

In the recent decision by the Supreme Court in *North Haven Bd. of Educ.* v. *Bell*, *supra*, the Supreme Court of the United States held that discrimination against female employees of a school receiving federal funds was barred. The critical language of Justice Blackmun's opinion for a total of six justices of the Supreme Court bears quotation at this point:

> Our starting point in determining the scope of Title IX is, of course, the statutory language. See Greyhound Corp. v. Mt. Hodo Stages, 437 US 322, 330, 57 L.Ed 2d 239, 98 S.Ct. 2370 (1978). Section 901(a)'s broad directive that "no person" may be discriminated against on the basis of gender appears on its face to include employees as well as students. Under that provision, employees, like other "persons," may not be "excluded from participation in," "denied the benefits of," or "subjected to discrimination under" education programs receiving federal financial support.
>
> Employees who directly participate in federal programs or who directly benefit from federal grants, loans, or contracts clearly fall within the first two protective categories described in § 901(a). See *Isleboro School Comm.* v. *Califano*, 593 F. 2d 424, 426 (CA1), cert. denied, 444 U.S. 972 (1979). In addition, a female employee who works in a federally funded education program is "subjected to discrimination under" that program if she is paid a lower salary for like work, given less opportunity for promotion, or forced to work under more adverse conditions than are her male colleagues. See *Dougherty Cty.*

School System v. *Harris*, 622 F. 2d 735, 737-738 (CA 5 1980), cert. pending *sub nom. Bell* v. *Dougherty Cty. School System*, No. 80-1023.

There is no doubt that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language." United States v. *Price*, 383 U.S. 787, 801 (1966); see also *Griffin* v. *Breckenridge*, 403 U.S. 88, 97 (1971); *Daniel* v. *Paul*, 395 U.S. 298, 307-308 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968); *Piedmont & Norther Ry.* v. *ICC*, 286 U.S. 299, 311-312 (1932). Because § 901(a) neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these "persons" unless other considerations counsel to the contrary. After all, Congress easily could have substituted "student" or "beneficiary" for the word "person" if it had wished to restrict the scope of § 901(a). (Emphasis added).

North Haven Bd. of Educ. v. *Bell*, 102 S.Ct. 1912, 1917-18 (1982).

It seems obvious to me that the Supreme Court's opinion quoted above directly rejects Judge Brown's conclusion in this case that the prohibition of sex discrimination in the statute is 1) solely directed at the financial grant programs and 2) cannot properly be applied to prohibit sex discrimination in the entire educational institution. Clearly the court's application of the sex discrimination ban to all employees of the school (including those not directly involved in the educational process) [7] was a much

[7] Before terminating this discussion of the impact of *North Haven* upon our instant case, I would point out (as did the dissenter in that case) that the majority opinion swept broadly enough to include within those employees of the college as to whom discrimination on the basis of gender was prohibited, not only teachers and administrators who were immediate participants in the educational process but also employees like secretaries and janitors who were

wider interpretation of the statute than HEW has followed in our instant case.

The majority opinion continued to find in the broad language of the sponsors of Title IX support for including employee discrimination within Title IX's prohibition of sex discrimination in educational activities. Without repeating the Court's legislative history or its postenactment history, I incorporate Sections B and C of the majority opinion by reference and rely upon the majority's obvious inclination to give the statute its full intended effect.

I now turn to the Third Circuit's treatment of the identical problem which we face in our instant case. There, as here, the educational institution concerned objected vigorously to any "generalized nonprogrammatic, or institutional basis" for Title IX application. Judge Garth's opinion, with which I am in complete agreement, dealt with the "program-specific" argument which my colleagues emphasize by adopting the response filed by the American Association of University Women:

> However the Supreme Court ultimately defines "program", it cannot conclude that the more general the scope and purpose of the funding, the more restrictive the coverage of this remedial civil rights statute will be. That result would be logically inconsistent. Yet Grove City asks this court to decide that an institution whose entire purpose is educational is exempt from coverage when it is financed with federal funds that can be used for virtually any educational purpose instead of a clearly limited function. The absurd result if this approach is followed to its logical conclusion is that general higher education aid would never bring the college under Title IX coverage because no specific program within the College

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neither direct participants in the educational process nor recipients thereof. 102 S.Ct. at 1928 (Powell, J., dissenting).

would be earmarked to benefit from the federal funding.

Grove City College v. *Bell*, 687 F.2d 684, 698 (3d Cir. 1982).

In addition Judge Garth quoted another commentator to support his result:

> [I]f two programs, one receiving federal aid directly and one not, are both administered by the same local agency for the education of essentially the same group of students, and if the funding of the former facilitates the latter by freeing funds for its use, or if discrimination in the latter affects the former by inhibiting or prohibiting a student's participation in that program, then both will be considered part of the same program for purposes of bringing the latter within the reach of Title IX.

Grove City College v. *Bell*, 687 F.2d 684, 698-99 (1982), quoting Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 55 Texas L.Rev. 103, 112 (1974).

Judge Garth concluded his discussion of the "program specific" issue in the following manner:

> Where the federal government furnishes indirect or non-earmarked aid to an institution, it is apparent to us that the institution itself must be the "program." Were it otherwise, and if it had to be demonstrated that each individual component of an integrated educational institution had in fact received the particular monies for a particular purpose, no termination sanction could ever effectively be imposed.
>
> We conclude that the remedy to be ordered for failure to comply with Title IX is as extensive as the program benefited by the federal funds involved. Because the federal grants made to Grove's students necessarily inure to the benefit of the entire College,

> the "program" here must be defined as the entire institution of Grove City College. Thus, Grove is incorrect in claiming that the program-specific provisions of the statute preclude Title IX coverage when indirect aid is involved.

Grove City College v. *Bell*, 687 F.2d 684, 700-01 (3d Cir. 1982).

There is no reason why the government of the United States should grant money to colleges which refuse to certify that they intend in using those funds to obey the laws of this country prohibiting discrimination against females. Hillsdale College, has, of course, a right to refuse to sign such a certificate. But equally clearly Hillsdale should have no right to relief in the federal courts to secure federal financing of its general educational program where it refuses to indicate, as required, that it will comply with federal Title IX mandates.

Title IX and Title VII are closely related statutes designed to give broad equal protection rights which a long history of discrimination has denied to women and minorities. The enactment of Title IX in 1972 forbidding discrimination against women in education was patterned after Title VI of the Civil Rights Act of 1964 which proscribed discrimination in any federally assisted program on the basis of race, color, or national origin; both statutes have parallel prohibitions and identical enforcement mechanisms similarly described.[8] In fact, "the drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI has been during the preceding eight years." *Cannon* v. *University of Chicago*, 441 U.S. 677, 696 (1979). Moreover the goals to which the statutes aspire are indeed similar. "Title IX, like its model Title VI, sought to accomplish two related, but neverthe-

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[8] Compare 20 U.S.C. §§ 1681-82 (Title IX) with 42 U.S.C. §§ 2000(d)-(d)(1). (Title VI).

less somewhat different objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Id.* at 704. Thus, as a final argument for an interpretation of the important statute before us that would not annul its broad nondiscriminatory purposes, the words of Senator Humphrey, one of the Senate sponsors of Title VI, as quoted by the Supreme Court, are apposite, substituting only the word sex for the word race.

> Simple justice requires that public funds, to which all taxpayers of [both sexes] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in [sex] discrimination.

Lau v. *Nichols*, 414 U.S. 563, 569 (1974).

Simple justice, recognition of Title IX's basic and broad remedial purpose and the other foregoing reasons dictate that I dissent from my colleagues' disturbingly narrow interpretation of this remedial statute. I would affirm the constitutionality of Title IX as applied in this case and the legality of the regulations issued by HEW which are in dispute.

If I were writing for the majority of this court, I would also remand to the agency for careful consideration of the timing of its order cutting off funds. Accordingly I suggest fund termination that will not affect students presently enrolled but only those who may enter in the future. At issue in this regard could be severe impact upon the education of students who are in any way responsible for this controversy. Additionally it may well be that the college itself will see fit to comply with the agency's regulation at the beginning of the school year after the regulation's legality and constitutionality are completely established.

This less harsh prospective remedy appears to be consistent with the Title IX statutory scheme. Indeed, the

remedies portion of the Act, Section 902, 20 U.S.C. § 1684 (1976), provides that compliance with the statute "*may* be effected" by termination of funding or "by any other means authorized by law." (emphasis added). Agency adoption of the suggested equitable remedy would be one which is "authorized by law" and would fall within the permissive grant of authority to fashion remedies. This conclusion is buttressed by the Supreme Court's observation in *Cannon v. University of Chicago*, 441 U.S. 677, 704-05 n.n. 38 & 39 (1979), that Congress intended the use of measures less severe than total fund cutoff where the statutory objectives of Title IX could be furthered by less heroic means.

[JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 80-3207

[Filed Dec. 16, 1982]

HILLSDALE COLLEGE,
Petitioner,

vs.

THE DEPARTMENT OF EDUCATION;
SHIRLEY M. HUFSTEDLER, SECRETARY,
Respondents.

Before: EDWARDS, Chief Circuit Judge; CECIL and BROWN, Senior Circuit Judges.

JUDGMENT

ON PETITION TO REVIEW a decision of the Department of Education.

THIS CAUSE came on to be heard on the transcript of record from the said Agency and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Agency in this cause be and the same is hereby reversed.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN
Clerk

/s/ John P. Hehman
Clerk

APPENDIX B

ADMINISTRATIVE PROCEEDING
IN THE
DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE

Docket No. A-7

IN THE MATTER OF HILLSDALE COLLEGE

and

STATE OF MICHIGAN

FINAL DECISION OF THE REVIEWING AUTHORITY (CIVIL RIGHTS)

[Dated: October 25, 1979]

STATEMENT OF THE CASE

This administrative enforcement proceeding was instituted by the United States Department of Health, Education, and Welfare (hereinafter referred to as the Department) against Hillsdale College pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, and the regulations issued thereunder, 45 C.F.R. § 86.1 *et seq.*

The proceeding was initiated on December 2, 1977, by serving a Notice of Opportunity for Hearing on Hillsdale College (hereinafter referred to as the Respondent), a private, nonsectarian, coeducational college, and the State of Michigan. The Notice of Opportunity for Hearing alleged that the Respondent was not in compliance with

Title IX and its implementing regulation, 45 C.F.R. § 86.4, which requires applicants for federal financial assistance to submit to the Department an Assurance of Compliance.[1] The Respondent filed an answer admitting its refusal to sign an Assurance of Compliance, but denying that the Department has the authority to require it to execute such Assurance.

Hillsdale College has an enrollment of approximately 1,000 students. A number of these students have obtained funds to pay some of their educational costs at Hillsdale College under one or more of the four following federally-funded programs: The National Direct Student Loan Program (NDSL), 20 U.S.C. §§ 1087aa *et seq.*; the Basic Educational Opportunity Grant (BEOG) and Supplemental Educational Opportunity Grant (SEOG) Programs, 20 U.S.C. § 1070a and b; and the Guaranteed Student Loan Program (GSL), 20 U.S.C. § 1071 *et seq.*

Under the NDSL Program, loans are made by the Respondent to students on the basis of need as determined by the requirements specified in the statute and regulations. NDSL funds are loaned to students to pay for the costs of their education at Hillsdale by direct payment either to the Respondent or to private vendors for books, housing, etc. Under the BEOG Program, students receive grants directly from the federal government for use in defraying educational costs by direct payment to the Respondent or to private vendors. Under the SEOG Program, federal funds are allocated to the Respondent by the Department which in turn are administered by the Respondent and awarded on the basis of need as determined by the requirements specified in the statute and regulations. These grants are then used by the students to defray the costs of their education by direct payment to the Respondent or to private vendors. Under the GSL Program, students apply to a private lending institution

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[1] HEW Form 639A.

for funds which then makes personal loans from its own assets or resources to be used by students to defray their educational costs by payments to the Respondent or to private vendors. These loans are guaranteed by the United States and a portion of the interest is paid by the government while the students are in college.

Neither Hillsdale College nor its students participate in other programs or activities which are funded, in whole or in part, by the federal government.

Section 86.4 of the regulations implementing Title IX requires every application for federal financial assistance to be accompanied by an Assurance of Compliance with Title IX and its regulations. On several occasions in 1977 the Director of the Office for Civil Rights requested in writing that Hillsdale College submit an executed Assurance of Compliance form. The Respondent has refused to file this Assurance (HEW Form 639 A) and has indicated that it has no intention of doing so in the future.

Pending a final order of termination in the instant proceeding, students are able to secure loans from funds in the Respondent's NDSL Program, grants under the BEOG Program, and loans from private lenders under the GSL Program to defray the costs of their education at the College.

The General Counsel for the Department brought this compliance proceeding, seeking an order pursuant to 45 C.F.R. § 80.10 which would terminate, refuse to grant or to continue, and find the Respondent ineligible to receive federal financial assistance which is administered by the Department to the Respondent.[2]

On August 23, 1978, the Administrative Law Judge (hereinafter referred to as Judge) issued his Initial Decision denying the relief requested by the General Coun-

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[2] Notice of Hearing at 6-7, *In the Matter of Hillsdale College* Docket No. A-7 (Filed December 2, 1977).

sel and dismissing the Notice of Hearing. The Judge concluded that although the Respondent was a recipient of federal financial assistance within the meaning of Title IX, the Department's requirement that the Respondent sign the Assurance of Compliance as a condition of the continued receipt of federal financial assistance was a demand that the Respondent comply with a portion of the regulations—i.e., those prohibiting sex discrimination in employment—which were declared invalid in whole or in part by several courts.[3] Thus the Judge refused to terminate federal financial assistance on the ground that to do so would be arbitrary, capricious, and an abuse of discretion, in view of the doubt cast on the Department's authority under Title IX to require compliance with those regulations dealing with employment.

Both the General Counsel for the Department of Health, Education, and Welfare and the Respondent have filed Exceptions to the Administrative Law Judge's Initial Decision.

Respondent's Exceptions

I.

Hillsdale excepts to the ruling by the Administrative Law Judge that the Title IX regulations which deem Hillsdale College a recipient of federal financial assistance

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[3] 45 C.F.R. §§ 86.51-86.61. The cases cited by the Administrative Law Judge were *Board of Education of the Bowling Green City School District v. United States Department of Health, Education and Welfare*, No. C-78-177 (N.D. Ohio, May 5, 1978) (preliminary injunction against enforcement issued); *Brunswick School Board v. Califano*, 449 F.Supp. 866 (D.Me. 1978); *Seattle University v. HEW*, No. C-77-6315 (W.D. Wash., January 20, 1978); *Romeo Community Schools v. United States Department of Health, Education and Welfare*, 438 F.Supp. 1021 (E.D. Mich. 1977), *appeal docketed*. These cases all hold that the regulation is invalid because the statute from which it is derived, the Education Amendments of 1972, §§ 901 *et seq.* is limited to a prohibition of sex discrimination against students and other direct beneficiaries of federal aid and does not cover discriminatory employment practices.

are not in excess of the statutory authority granted HEW by Congress.

The Exception is denied.

The Respondent argued that it is not subject to Title IX because it is not a recipient of federal financial assistance. However, as the Judge correctly noted, the Respondent participates both as the initial and final recipient of federal funds through its involvement in several student financial aid programs funded, in whole or in part, by the Department. This financial aid enables students to pay for the education they receive at Hillsdale College by defraying their costs of tuition, books, room and board, and other expenses. Since these funds would otherwise have to be provided by the Respondent itself, the federal funds in the form of loans or grants release the Respondent's funds for other educational purposes. Moreover, the pool of applicants from which the Respondent can select its students is broadened to the extent that the federal grant and loan programs enable students, who would not otherwise have the financial means to do so, to attend Hillsdale College.

Payments under these student grant and loan programs are clearly federal financial assistance to the Respondent under the regulations promulgated pursuant to Title IX,[4] and the Respondent is a "recipient" of such assistance.[5] This construction of the statute, incorporated by the Department in its regulations, is supported by *Bob Jones University v. Johnson*, 306 F.Supp. 596 (D.S.C. 1974), *aff'd per curiam*, 529 F.2d 514 (4th Cir. 1975). In that case, the District Court held that an educational institution which enrolled students who received cash payments under federal assistance programs for veterans was a recipient of federal financial assistance within the

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[4] 45 C.F.R. § 86.2(g)(1)(ii) and § 86.2(g)(5).

[5] 45 C.F.R. § 86.2(h).

meaning of Title VI.[6] The cash payments were used by veterans to defray the costs of the university's educational program, releasing institutional funds for other uses which, in the absence of federal funds, would have been spent on these students. Moreover, as here, the university was benefited by enlarging its pool of qualified applicants. 396 F.Supp. at 601-03. *Cf. Norwood v. Harrison*, 413 U.S. 455 (1973) (state program of lending textbooks to private school students is "a form of financial assistance inuring to the benefit of the private schools themselves"); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). (The effect of tuition reimbursement payments to parents is to provide financial support for the institutions.)

We do not deem it a significant distinction that the *Bob Jones* case involved a discriminatory admissions policy. The admissions policy was not the federal funded program in *Bob Jones*; rather, the veterans benefits paid to students attending Bob Jones were sufficient to render that school a "recipient" of federal assistance such that *each* program operated by Bob Jones, including the admissions program, must be operated in compliance with Title VI. Analogously, in the case at bar, the federal financial assistance given to students attending Hillsdale College renders that institution a "recipient", requiring that each of its programs comport with Title IX. We are not holding here that the entire operation of the Respondent is the "program or activity receiving federal financial assistance" for purposes of terminating funds when a violation of Title VI or Title IX has been found in one aspect of the Respondent's operations. The "pinpoint provision" for terminating federal financial assistance applies to the sanction to be imposed when discriminatory

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[6] The wording of Title IX, 20 U.S.C. § 1681(a), is virtually identical to that of Title VI, 42 U.S.C. § 2000d, and both parties agree that decisions construing Title VI are pertinent to the construction of Title IX. Initial Decision p. 19.

conduct has been found—i.e., which funds may appropriately be terminated once discrimination has been proven. This is not the question before us. The question, rather, is whether federal funds made available through student grant and loan programs are financial assistance to the Respondent such as to constitute it a "recipient" of federal assistance within the meaning of Title IX, thereby requiring it to execute an assurance that it will not discriminate in those programs to which Title IX applies.

We think it worth noting that an amendment to Title IX specifically introduced to address the question raised in the *Bob Jones* case, that an institution which received no federal funds other than through student assistance would be exempt from Title IX, was rejected by the Senate in 1976. 122 CONG. REC. S14760-14764 (daily ed. August 27, 1976).

Respondent also argues that the Judge erred in disregarding Hillsdale's argument that, if Title IX is construed so as to authorize HEW's regulation of all of Hillsdale's activities and programs, then constitutional issues are necessarily entailed. The Respondent urges: "Hillsdale's construction of Title IX should therefore be accepted since it is, of course, a well recognized principle that an Act of Congress should, if possible, be construed in a manner which avoids questions of its constitutionality." Respondent's Exceptions p. 9.

Both parties and the Judge agree that an Administrative Law Judge cannot rule a statute unconstitutional. We likewise are without authority to review Respondent's constitutional claims. However, Respondent urges us to adopt a narrow construction of Title IX "to avoid questions of its constitutionality". We know of no "recognized principle" that suggests that whenever one party intends to raise constitutional issues, the statute in question should be narrowed in its favor so as to avoid the constitutional challenges. Respondent, it seems, would have us assume the correctness of its constitutional chal-

lenges, and narrow the statute to "save it" in order to avoid constitutional questions that all agree we have no authority to pass on. This invitation we respectfully decline.

The Judge's holding that Hillsdale College is a recipient of federal financial assistance for purposes of Title IX enforcement is affirmed and the exceptions to the contrary denied.

II.

Hillsdale excepts to the determination by the Judge that the regulations promulgated by the Department are not, as a matter of law, in excess of the statutory authority granted the Department by Congress under Title IX.

The Exception is denied.

The only regulation properly before the Reviewing Authority is 45 C.F.R. § 86.4 which requires that all applications for federal financial assistance be accompanied by an executed Assurance of Compliance. Respondent does not challenge the validity of this regulation as a legitimate and lawful means of enforcing Title IX. Respondent asks that we rule invalid those regulations pertaining to student recruitment, dormitory regulations, pregnant students, to name a few. The Judge refused to do so, indicating that a determination of the validity of any particular Title IX regulation must await a factual framework within which a discriminatory practice has been alleged. We likewise decline to pass on the validity of any regulation that has not been allegedly violated. Suffice it to say that an Assurance of Compliance commits an institution to abide only by those regulations which are valid. Any regulations judicially determined to be unconstitutional or beyond the scope of statutory authority can not be deemed binding upon an institution.

Department's Exceptions

I.

The Department excepts to the Initial Decision on the ground that the Judge exceeded his authority by not enforcing the regulations implementing Title IX of the Education Amendments of 1972, in particular, 45 C.F.R. § 86.4.

The Exception is granted in part.

We agree with the Department that the Judge, by virtue of his designation by the Reviewing Authority, was empowered to apply the regulations implementing Title IX, 45 C.F.R. Part 86. Section 86.4 provides in relevant part:

> Every application for Federal financial assistance for any educational program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Director, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.

The Judge in his Findings of Fact determined that Respondent Institution, in refusing to execute the specified form (HEW Form 639 A) as the Assurance of Compliance with Title IX regulations, has refused to comply with 45 C.F.R. § 86.4.[7]

Neither party has challenged the validity of § 86.4 [8] and in our view it is a legitimate and lawful means of enforcing Title IX. As a condition of receiving federal funds, surely the federal government may require a statement from the recipient that it will abide by the Civil Rights laws in the use of that money. This statement puts

[7] Init. Dec. at 10 (Finding of Fact 17).

[8] Init. Dec. at 23.

the recipient on notice that in taking these funds there is an obligation not to discriminate and gives the government some assurance that the recipient understands these obligations and intends to abide by them. The Respondent was clearly and deliberately in violation of this valid regulation, and further efforts at obtaining voluntary compliance are futile. Hence the Respondent, having failed to execute the Assurance which is the condition precedent to receipt of federal funds, should not receive such funds.

We therefore hold that, as a condition of receiving federal funds, the applicant institution must execute an acceptable Assurance of Compliance, binding it to comply with all lawful regulations.

The Department also claims that the Judge "rendered the effect of the regulations implementing Title IX null and void." We do not reach the question of whether other portions of Part 86, in particular those regulations pertaining to employment practices, are invalid as exceeding the scope of statutory authority. As we noted *supra*, none of these regulations are properly challenged here. The only violation charged in this proceeding is Respondent's refusal to sign an Assurance of Compliance.

We do not ignore the fact that executing an Assurance of Compliance would impose a contractual duty on the Respondent to comply with Title IX and its regulations where applicable. However, as we have earlier noted, should the Title IX regulations, in whole or in part, subsequently be judicially found to be in excess of statutory authorization, the Respondent and other similarly situated institutions would clearly not be bound by such invalid regulations. By executing an Assurance of Compliance, Hillsdale College is bound to comply only with lawful regulations.

II.

The Department excepts to the Judge's finding that loans secured by students under the Guaranteed Loan

Program do not constitute federal financial assistance for the purpose of enforcing Title IX.

The Exception is granted.

The Judge concluded that the Guaranteed Student Loan Program (GSL) was exempt from Title IX coverage by virtue of § 902 of Title IX, 20 U.S.C. § 1682, which defines federal financial assistance as any grant, loan, or contract "other than a contract of insurance or guaranty." Under the GSL Program, students apply to private lending institutions for loans to defray their educational costs. The loans are guaranteed in whole or in part by the federal government. U.S.C. § 1071 *et seq.*; 45 C.F.R. §§ 177.31, 177.41-.43. The Government's guaranty to a lender against default by a student borrower, by itself, seems to come within the exemption in § 902. However, under the GSL Program, the Government also pays interest to the lender on behalf of student borrowers while they are attending college. 45 C.F.R. §§ 177.2, 177.4. This is in effect a subsidy of federal funds from which the Respondent benefits. We agree with Judge Feldman's conclusions in his Initial Decision in *Grove City College*, Docket No. A-22 (Sept. 15, 1978):

> [T]he Government not only guarantees the payment of the student loans, but also the Government undertakes and pays interest on the loans to the lender while the student is in school. This would seem to remove this contract from being a contract of insurance or guaranty. The obligation of the Government is more that of a principal than that of an insurer or guarantor.

In other words, while a contract of insurance or guaranty alone does not involve an expenditure of federal funds unless and until the borrower defaults—i.e., it is a conditional contract—the interest payments under the GSL Program are direct and immediate disbursements of fed-

eral funds aiding the Respondent in the same way as the funds disbursed under the NDSL Program.

We therefore conclude that the GSL Program, in its operation, goes beyond the terms of the contract of insurance or guaranty exclusion and falls within the purview of Title IX. The Judge's holding that loans secured under the GSL Program do not constitute federal financial assistance for Title IX purposes is therefore overruled.

Order

In view of what has been said in response to the Exceptions of the Department and Respondent, we hereby reverse the part of the Judge's decision which is inconsistent with our rulings herein, and hold the Respondent, Hillsdale College, to be in noncompliance with Part 86.4 of the regulations implementing Title IX of the Education Amendments of 1972. We further hold that in order to be eligible for federal financial assistance, Respondent must comply with Part 86.4 by executing an approved Assurance of Compliance form. All Exceptions to the contrary are denied.

JAMES BIERMAN

BETSY LEVIN

OLIVER MORSE

APPENDIX C

ADMINISTRATIVE PROCEEDING IN THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Docket No. A-7

IN THE MATTER OF
HILLSDALE COLLEGE and
STATE OF MICHIGAN

INITIAL DECISION

[Dated: August 23, 1978]

Preliminary Statement

This is a proceeding under Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*) and the regulations of the Department of Health, Education, and Welfare (45 CFR 86.1 *et seq.*) instituted by a Notice of Hearing, dated December 2, 1977, filed by the General Counsel, Department of Health, Education, and Welfare alleging, in part, that Hillsdale College, Respondent Institution, receives, has applied for, or is eligible to apply for, Federal financial assistance for its program of post-secondary education from the State of Michigan, Respondent State Agency, and directly from the Department of Health, Education, and Welfare, under one or more acts of Congress administered by the Department of Health, Education, and Welfare; and that Hillsdale has not submitted to DHEW an adequate Assurance of Compliance with Title IX and its implementing regulation, as required by such regulation, although it has received timely

notice that its failure to do so is violative of such regulation and despite the attempt by the Office of Civil Rights, DHEW, to obtain its compliance by voluntary means. The Notice of Hearing further alleges that as long as Respondent continues to fail to submit an adequate Assurance of Compliance it is in violation of Title IX and is not eligible to receive the Federal financial assistance described in the notice.

The General Counsel prays for, in part, an order "Terminating, refusing to grant or to continue, and finding Respondent Institution ineligible to receive, Federal financial assistance which is administered by DHEW directly to the Respondent Institution or through the Respondent State Agency" which shall remain in force until Hillsdale College satisfies the Director of the Office of Civil Rights that it has complied with the requirements of Title IX of the Education Amendments of 1972 and that it has provided assurance that it will comply in the future with such requirements.

The Notice of Hearing merely alleges with respect to the State of Michigan that it exercises general supervision over the institution of higher education of the State, including Respondent Institution, and that it is "responsible for receiving, administering, and disbursing specified funds granted to the State by the Federal government for educational purposes under various acts of Congress administered by DHEW, and its duties in this connection normally extend to and include the distribution of a portion of such funds to Respondent Institution." The State of Michigan filed an answer dated January 5, 1978. It is alleged therein, in part, that "the State Board of Education receives, administers and disburses funds granted to the state by the federal government for educational purposes under various acts of Congress administered by DHEW, but no funds are distributed to Respondent Institution."

Hillsdale College filed an answer to the Notice of Hearing January 4, 1978 in which it, in part, admits that it has not submitted an Assurance of Compliance but denies that the General Counsel is authorized by Title IX to bring this action, that the Secretary of Health, Education, and Welfare has authority to require it to execute such assurance or that it is eligible as, or is, a recipient of Federal financial assistance. In its answer, Hillsdale College alleges several affirmative defenses to the effect that while its students have and do receive Federal funds to finance their education, it does not receive Federal financial assistance "which is paid directly to the college to use as the college sees fit or paid to the college to fund any specific program or activity which Hillsdale College maintains for the benefit of its students," that the regulations purportedly promulgated pursuant to Title IX are in excess of statutory authority and violative of the Constitution of the United States, that this proceeding to, in effect, terminate and refuse to continue Federal financial assistance to the students of Hillsdale College is illegal and that the regulations involved are violative of the Constitution of the United States if within the scope of statutory authority.

Administrative Law Judge, Herbert L. Perlman, Environmental Protection Agency, was designated on January 20, 1978 as the Administrative Law Judge to preside in this proceeding and to issue an Initial Decision herein. The Administrative Law Judge held a prehearing conference February 2, 1978 in Washington, D.C. The General Counsel was represented by Harriet Kuryk and Bonnie Milstein, Attorneys at Law, Washington, D.C., and Respondent Institution was represented by Gordon C. Coffman and John Michael Facciola, Attorneys at Law, Washington, D.C. The Respondent State Agency, which was excused from further proceedings in this matter by order dated January 26, 1978 upon agreement of the parties as, in part, "the allegations in the notice of hear-

ing herein contain no averments of unlawful conduct against the Respondent State Agency", was not represented at the conference.

As a result of such conference, as set forth in a report thereof dated February 3, 1978, the hearing in this proceeding was vacated and a joint stipulation of facts and accompanying exhibits filed by the parties, as amended by the Report of Prehearing Conference, constitute the record of this proceeding. Subsequently, the parties filed statements of position and opening and reply briefs.

Findings of Fact

1. Respondent Institution, Hillsdale College, is a private, nonsectarian, coeducational college located in Hillsdale, Michigan. Its present enrollment is approximately 1,000 students. The college awards three undergraduate degrees, Bachelor of Arts, Bachelor of Science, and Bachelor of Liberal Studies.

2. The State of Michigan is the Respondent State Agency in this proceeding. The State of Michigan Board of Education, through the head of the Department of Education, only exercises general supervision over private institutions of higher education, including Respondent Institution, within the limits of the lawful authority conferred upon the State Board of Education under Michigan law. The State Board of Education receives, administers and disburses funds granted to the State of Michigan by the Federal government for educational purposes under various acts of Congress administered by the Department of Health, Education, and Welfare, but no funds are presently distributed to Respondent Institution.

3. In the year ending June 30, 1978, as in previous years, a number of students attending Hillsdale College secured funds to pay their tuition to Hillsdale College and other educational costs by virtue of moneys appropriated by Congress and allocated by the Department of Health, Education and Welfare pursuant to the National

Direct Student Loan Program, 20 U.S.C. 1087aa *et seq.*, and the Basic Educational Opportunity Grant Program and Supplemental Educational Opportunity Grant Program, 20 U.S.C. 1070a and b. Additionally, a number of students secured loans from private institutions to defray educational expenses at Hillsdale, which loans are guaranteed, in whole or in part, by the United States under the Guaranteed Student Loan Program, 20 U.S.C. 1071 *et seq.*

4. In the year ending June 30, 1978, certain students of Hillsdale College who are veterans secured funds directly from the United States pursuant to the Veterans Education Benefits Act, 38 U.S.C. chapters 31, 34, 35 and 36. Said funds are administered by the Veterans Administration, not the Department of Health, Education and Welfare, and are not now the subject of these proceedings.

5. Under the National Direct Student Loan Program (NDSL) as it exists at Hillsdale College, loans are made by Hillsdale to its students on the basis of their need in compliance with the applicable requirements specified in the statute creating the NDSL program and the appropriate HEW regulations. 45 CFR 144.1 *et seq.* (1976). All funds from said NDSL fund at Hillsdale are paid to students who, in turn, use said funds to pay the costs of their education at Hillsdale either by direct payment to Hillsdale (*e.g.*, tuition) or to private vendors (*e.g.*, books, rent for off-campus housing, etc.). In the year ending June 30, 1977, the Department of Health, Education and Welfare allocated $40,548 as the federal capital contribution to this loan fund. In the year ending June 30, 1978, Hillsdale College did not receive a federal contribution to this fund because the cash on hand has been sufficient for its needs. In the year ending June 30, 1978, approximately 107 students at Hillsdale College have secured approximately $104,000 in such loans.

6. Under the Basic Educational Opportunity Grant Program (BEOG), students who attend Hillsdale College

secure federal funds, appropriated by Congress for use in the program, directly from the United States. Upon receipt the student uses his or her grant to defray educational costs by direct payment to Hillsdale (*e.g.*, tuition) or by payment to private vendors (*e.g.*, books, rent for off-campus housing, etc.). In the year ending June 30, 1978, 54 students who attend Hillsdale College have secured approximately $54,000 in such grants.

7. Under the Guaranteed Student Loan Program (GSL), as it exists at Hillsdale College, a student desirous of securing a loan guaranteed in whole or in part by the United States applies to a private lending institution which, from its own capital, makes a loan to the student who, in turn, uses the funds to defray educational costs by payment to Hillsdale College (*e.g.*, tuition) or by payment to private vendors (*e.g.*, books, rent for off-campus housing, etc.). In the year ending June 30, 51 Hillsdale students have secured aproximately $123,306 in these loans.

8. Under the Supplemental Educational Opportunity Grant Program (SEOG), funds, appropriated by Congress and allocated to Hillsdale by DHEW, are awarded by Hillsdale to needy students in compliance with the applicable requirements specified in the statute creating the SEOG program and the appropriate HEW regulations. 45 CFR 176.1 *et seq.* (1976). The students then utilize the grants to defray the costs of their education by direct payment to Hillsdale (*e.g.*, tuition) or by payment to private vendors (*e.g.*, books, rent for off-campus housing, etc.) In the year ending June 30, 1978, approximately 53 students attending Hillsdale College have been awarded the $37,400 allocated to Hillsdale by DHEW.

9. Besides the funds appropriated and allocated under the programs enumerated in Findings of Fact 3-8 above, neither Hillsdale College nor its students participate in any other programs or activities which are funded, in

whole or in part, by the United States. Hillsdale College did participate in the College Work Study program, created pursuant to the statutory authority of 42 U.S.C. 2751 *et seq.*, in the year ending June 30, 1977. Although funds in the amount of $17,325 were allocated to Hillsdale College under said program for use in the year ending June 30, 1978, Hillsdale College decided not to continue such a program and neither requested nor accepted the funds allocated to it for this program from the United States.

10. Hillsdale College has been deemed eligible by DHEW to participate in the programs specified in Findings of Fact 3-9 above under the applicable program regulations.

11. Regulations implementing Title IX of the Education Amendments of 1972, U.S.C. 1681 *et seq.*, at 45 CFR Part 86, became effective on July 25, 1975, and were published for general notice. 40 F.R. 24128.

12. Section 86.4 of said regulations requires every application for Federal financial assistance to be accompanied by an Assurance of Compliance with said regulations.

13. Section 86.2(g)(ii) defines Federal financial assistance to include, *inter alia*:

> "Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity."

14. The Director of the Office of Civil Rights, DHEW, has specified HEW Form 639A as the Assurance of Compliance with the Title IX regulations which is acceptable to him.

15. On several occasions in 1977, the Director of the Office of Civil Rights has requested, in writing, that Hilldale College submit an executed HEW Form 639A and Hillsdale College has not done so.

16. In a letter dated December 3, 1977, the Director of the Office of Civil Rights advised Hillsdale College that if HEW Form 639A was not completed and returned within ten days of receipt of said letter, enforcement action would be initiated against Hillsdale College to secure its compliance with 45 CFR 86.4 (1976).

17. Hillsdale College has not requested assistance from the Office of Civil Rights, DHEW, to aid it in complying with 45 CFR 86.4. Continued voluntary efforts by DHEW to secure its execution of HEW Form 639A will be futile. Hillsdale College has refused to file and has no intention to file an executed HEW Form 639A.

18. On or about October 16, 1977, Hillsdale College submitted a certain DHEW form applying to DHEW for the allocation of $34,557 to the SEOG program it participates in and for authorization to maintain a level of lending of $103,671 in its NDSL program.

19. On or about December 3, 1977, the Director of the Office of Civil Rights advised Hillsdale College by letter that he was imposing a deferral, commencing January 3, 1978, on "final approval of applications for Federal financial assistance filed on behalf of your institution for new programs and for increases in the funding of continuing programs" until the conclusion of this proceeding. Subsequent thereto, the consequence of the deferral has been explained to mean that in the fall semester of 1978 Respondent Institution may loan the $103,671 in its National Direct Student Loan Program to its students and that "In the absence of a final order of termination [in this proceeding] signed by the Secretary and the passage of 30 days after transmittal to the appropriate committees of Congress, students who intend to attend Respondent Institution in the fall semester of 1978, and who otherwise qualify, will be able to secure Basic Educational Opportunity Grants to defray the costs of their education at Hillsdale" and "will be able to secure loans from private lenders under Guaranteed Student Loan Program to

defray the costs of their education at Hillsdale." Hillsdale's application for the Supplemental Education Opportunity Grant Program remains deferred pursuant to the December 3, deferral of the Director of the Office of Civil Rights.

Conclusions

I

In this proceeding under Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*) and the regulations of the Department of Health, Education, and Welfare (45 CFR 36.1 *et seq.*), the General Counsel seeks an order terminating what is alleged to be Federal financial assistance Hillsdale College is now receiving and which it might be eligible to apply for and receive in the future on the ground that it has failed to submit an Assurance of Compliance as required by section 86.4 of the applicable regulations (45 CFR 86.4).[1] The General Counsel also seeks an order which will prohibit the State of Michigan from disbursing Federal financial assistance to Respondent Institution in the future by reason of such failure (See also 45 CFR 80.8). Hillsdale College contends that it does not operate any "education program or activity receiving Federal financial assistance", that it is not therefore a "recipient" of such assistance within the meaning of Title IX and that it is not subject to regulation by the Department of Health, Education, and Welfare.

Title IX of the Education Amendments of 1972, enacted into law on June 23, 1972, was designed to prevent

[1] Section 86.4 reads, in part, as follows:

(a) General. Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Director, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. . ."

sex discrimination in federally assisted education programs. Section 901, 20 U.S.C. Section 1681, provides, in pertinent part, as follows:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

Section 902 directed the promulgation of regulations to effectuate the provisions of Section 901.[2] DHEW pub-

[2] Section 902 provides as follows:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the

lished final regulations to effectuate Title IX on June 4, 1975. Section 86.2(g) of such regulations (45 CFR 86.2 (g)) defines "Federal financial assistance" to mean, in part, "any of the following, when authorized or extended under a law administered by" the Department of Health, Education, and Welfare:

> "(1) A grant or loan of Federal financial assistance, including funds made available for:
>
> (i) ...
>
> (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity ....
>
> (5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty."

Such regulations, in sections 86.2(h) and (i) thereof, define "Recipient" and "Application", respectively, to include therein an institution "to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance . . ." (45 CFR 86.2(h)) and "one who submits an application, request, or plan required to be approved by" an official of the Department of Health, Education, and Welfare, "or by a recipient, as a condition to becoming a recipient." (45 CFR 86.2(i)).

Hillsdale College participates directly as the initial and final recipient of Federal funds and indirectly as the final

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House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

recipient of Federal funds in several student financial aid programs funded, in whole or in part, by the Department of Health, Education, and Welfare. These programs are the National Direct Student Loan Program (hereinafter sometimes referred to as "NDSL"), 20 U.S.C. 1087aa *et seq.*, 45 CFR 144.1 *et seq.*, the Basic Educational Opportunity Grant Program (hereinafter referred to as "BEOG"), 20 U.S.C. 1070a, 45 CFR 190.1 *et seq.*, and the Supplemental Educational Opportunity Grant Program (sometimes hereinafter referred to as "SEOG"), 20 U.S. 1070b, 45 CFR 176.1 *et seq.* Hillsdale also participates in the Guaranteed Student Loan Program (sometimes hereinafter referred to as "GSL"), 20 U.S.C. 1071 *et seq.*, 45 CFR 177.1 *et seq.*, but the funds are provided directly to the student from private lenders.[3]

Funds under the NDSL program are allocated to students through a student loan fund which is established and maintained by the participating educational institution. The program operates through a fund at the institution which consists primarily of federal capital contributions and also of contributions thereto by the institution. Loans therefrom are repaid directly to the institution and are used to make new loans to other needy students. The funds are administered by the participating institution and administrative expenses incurred in the operation of the program are authorized to be paid out of the fund to such institution. The SEOG program, a grant and not a loan program, is similarly administered by the educational institution. Under both the NDSL and SEOG programs, the college applies for and plays an active role in distributing federal funds to needy students. Direct grants to students by DHEW are made under the BEOG

[3] The Department of Health, Education, and Welfare also allocated funds to Hillsdale College under the College Work Study Program, 42 U.S.C. 2751 *et seq.*, 45 CFR 175.1 *et seq.*, but the college has not availed itself of such funds.

program, but grants are conditioned upon the enrollment of the student at an approved institution of higher education. The student receives a low-interest rate loan from a private lending institution under the GSL program for the purpose of defraying the costs of attending an approved educational institution. Such loan is guaranteed in whole or in part by the Federal government and, more specifically, by DHEW.[4]

The General Counsel contends that signing an Assurance of Compliance is a prerequisite to the continuation of Federal financial assistance provided under these programs and requests that the Federal payments be terminated until Respondent Institution does file an Assurance of Compliance.[5] Hillsdale defends its refusal to sign the assurance on the grounds that Federal funds provided for student financial aid are not Federal financial assistance to an education program or activity within the meaning of Title IX, and that the regulations making such student aid programs subject to Title IX exceed DHEW's authority under the Act.[6]

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[4] Section 902 of Title IX exempts "contract of insurance or guaranty" from its coverage. However, one of the purposes of the GSL program is to provide for the payment of a portion of the interest on loans to qualified students and such payments are made by the Department of Health, Education, and Welfare (See 20 U.S.C. 1071 and 45 CFR 177.2 and 177.4).

[5] This apparently means the termination of funds paid directly to Hillsdale under the NDSL and the SEOG programs, the termination of funds paid directly to Hillsdale students under the BEOG program, and the termination of interest payments to the lending institution under the GSL program. The termination of these loans, grants and payments would presumably apply to financial aid extended to students of both sexes. DHEW also requests that funds under the College Work Study program be terminated, but Hillsdale has decided not to continue this program. It would appear, accordingly, that the issue with respect to this program is moot.

[6] Hillsdale also argues that Title IX as construed and enforced by the regulations is unconstitutional. As Hillsdale itself recognizes, Administrative Law Judges do not have authority to rule a

II

Payments by DHEW under the NDSL, SEOG and BEOG programs are clearly Federal financial assistance received by Hillsdale under the regulations. (See 45 CFR 86.2(g)(1)(ii) and 86.2(g)(5)). They are grants or loans of Federal funds either extended to Hillsdale for payment to or on behalf of students admitted to Hillsdale or extended directly to students for payment to Hillsdale. Hillsdale is a "recipient" of such Federal financial assistance. (See 45 CFR 86.2(h)). The financial assistance program helps students pay for the education at Hillsdale by defraying their costs of tuition, books, room and board and other expenses incurred in attending Hillsdale. Since funds are provided which Hillsdale would otherwise have to supply from its own resources, the total funds available to Hillsdale to carry on its education programs and activities are increased. (See also Exhibit J). The Federal programs also allow students to attend Hillsdale who would otherwise not have the financial means to do so, and so enlarge the population on which Hillsdale can draw for students.

The GSL program, on the other hand, involves the guarantee of loans made by private lending institutions to students attending Hillsdale, and the payment of interest by the Government in some cases to those lenders. For the reasons stated below, it is concluded that the GSL program falls within the exemption in Section 902 of Title IX, 20 U.S.C. Section 1682, for a contract of insurance or guaranty.

A regulation promulgated under a general authorization provision is within the agency's authority so long as it is reasonably related to the purposes of the enabling legislation. See, *e.g.*, *Mourning* v. *Family Publications*

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statute unconstitutional. See Weinberger v. Salfi, 422 U.S. 749, 765 (1975). Consequently, the constitutional objections will not be considered in this decision.

Service, Inc., 411 U.S. 356, 369 (1973.[7] Hillsdale contends that the inclusion of financial aid extended directly to students goes beyond the purposes of Title IX, since it is the student who is the "recipient" of such financial assistance and not Hillsdale. It further contends that Title IX was intended to apply only to specific education programs and activities which directly receive Federal aid.

The construction of the statute incorporated by DHEW in its regulations, that is, with respect, in effect, to the "recipient" of Federal financial assistance and the definition of "Federal financial assistance" itself is authorized and persuasively supported by the case of *Bob Jones University* v. *Johnson*, 306 F.Supp. 597 (D.S.C. 1974), *aff'd per curiam*, 529 F.2d 514 (4th Cir. 1975), a case arising under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*). The wording of Section 901(a) of Title IX, 20 U.S.C. Section 1681(a), is virtually identical to Section 601 of Title VI, and the parties agree that decisions construing Title VI are pertinent to the construction of Title IX.[8]

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[7] The General Counsel argues that I have no authority to rule on the validity of duly promulgated regulations, although it does concede that I may interpret statutory authority. An agency, however, does have authority to determine whether a regulation or the manner in which it is applied is within the scope of its statutory authority. *Cf.*, Atlantic & Gulf Stevedores, Inc. v. OSHRC, 534 F.2d 541 (3d Cir. 1976); Presque Isle TV Co. v. United States, 387 F.2d 502, 505 (1st Cir. 1967). The Administrative Law Judge, pursuant to his authority under 5 U.S.C. 557(c) to consider all material questions of fact, law or discretion, has authority to decide if agency action, regardless of whether it is the regulation itself or its application, is outside the scope of the agency's statutory authority.

[8] Section 601 of Title VI (42 U.S.C. 2000d) reads as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Bob Jones involved the payment of veterans' benefits to veterans attending Bob Jones University. The University had a policy of denying admission to unmarried nonwhite students and providing for expulsion of students who dated members of any race other than their own. Administrative proceedings were instituted against Bob Jones University after it refused to sign an assurance of compliance with Title VI. Following an evidentiary hearing, all VA assistance to Bob Jones University was terminated and the right of veterans assistance was denied to veterans who applied to attend Bob Jones University in the future. 396 F.Supp. at 599-600.

The court held that a university which enrolled students who received direct cash payments under Federal assistance programs for veterans conditioned upon the veteran's pursuit of an approved course of study at an approved educational institution, was a recipient of Federal financial assistance within the meaning of Title VI. The cash payments received by the veterans in *Bob Jones* were like the student aid extended herein in that they were utilized to meet education expenses including tuition, books, subsistence and equipment costs. The court, in rejecting the claim that direct payments to students were not covered by Title VI, stated, 396 F.Supp. at 601-602:

> Plaintiffs argue that because the federal cash payments go directly to the veteran, it is the veteran who is the beneficiary of the VA programs, not Bob Jones. The method of payment does not determine the result; the literal language of Section 601 requires only federal assistance—not payment—to a program or activity for Title VI to attach. The appropriate questions are (1) whether the federally subsidized veteran participates in a "program or activity" and, if so, (2) whether that program or activity is "receiving federal financial assistance". The facts in this case project an affirmative answer as to both questions.

The court found that the payments were not unrestricted grants but were tied directly to the veteran's participation in an approved education activity and therefore *Bob Jones* was conducting a program or activity subject to Title VI. 396 F. Supp. at 602. The court further found that the Federal cash payments did render financial assistance to *Bob Jones*' education program. The federal payments to veterans released institutional funds which would, in the absence of this Federal assistance, have been spent on students. The fact that veterans could enter educational programs because of the availability of Federal funds was also viewed as benefitting *Bob Jones* by enlarging its pool of qualified applicants. 396 F. Supp. at 602-603. The court finally noted that the broad language of Title VI should be interpreted in the remedial context in which it was presented to Congress. Thus, narrow readings of Title VI coverage were found inappropriate. *Id.* at 604.

Hillsdale argues that *Bob Jones* is distinguishable because of the court's perception that to allow continuation of the Federal funds would have put the United States in the position of aiding racial discrimination in violation of its constitutional responsibilities under the Fifth Amendment.[9] Whether or not Federal aid of practices discriminating on the basis of sex would be constitutionally impermissible is a question I do not have to reach.[10] Title IX does manifest a public policy against sex discrimination. As a remedial statute it is to be liberally construed. See

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[9] Title VI was intended to prohibit Federal funds from being used to support practices of segregation or discrimination which are inconsistent with the standards imposed upon state and Federal actions by the Fourteenth and Fifth Amendments. Regents of the University of California v. Bakke, —— U.S. ——, 46 U.S.L.W. 4897, 4900-01 (1978).

[10] It would appear, however, that there are constitutional limitations upon discrimination by sex. See Califano v. Webster, 430 U.S. 313, 317 (1977). (Classifications by gender are protected by the Equal Protection Clause of the Fifth Amendment.)

e.g., *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967). The fact that a policy has a statutory rather than a constitutional basis is not a justification for applying it more restrictively. In addition, the alleged mental processes of the court do not detract from its holding and do not form a basis for a distinction from the facts of this proceeding.

Hillsdale would also find significant the fact that payment of benefits under the G.I. Bill was first made directly to the institution and then changed so as to be made to the student, while the student aid programs in which Hillsdale participates have always involved payments directly to the student. In fact, this distinction was considered irrelevant by the court which stated the following, 396 F.Supp. at 603-604:

> Whether the cash payments are made to a university and thereafter distributed to eligible veterans rather than the present mode of transmittal is irrelevant, since the payments ultimately reach the same beneficiaries and the benefit to a university would be the same in either event. To argue otherwise would be to suggest that the applicability of Title VI turns on the role of a university as an exchange. It would hold, for example, that the reach of Title VI extends to the VA administered Vocational Rehabilitation Act, 29 U.S.C. Sec. 31, since federal tuition payments are made directly to the schools under that Act, but not to the other VA educational benefits statutes because payments under those statutes flow to a university through the veterans. No rational distinction with respect to Title VI coverage can be made on this basis.

In another context, the validity of tuition grants and other aid to students attending private racially segregated schools under the Equal Protection Clause of the Constitution, the courts have not adopted the restrictive construction of governmental financial assistance advanced by Re-

spondent Institution. Cf, *e.g.*, *Brown* v. *South Carolina State Board of Education*, 296 F.Supp. 199 (D.S.C. 1968), *aff'd per curiam* 393 U.S. 222 (1968); *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam* 389 U.S. 571 (1968); *Lee* v. *Macon County Board of Education*, 267 F.Supp. 458 (E.D. Ala. 1967), *aff'd sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967); *Griffin* v. *State Board of Education*, 239 F.Supp. 560 (E.D. Va. 1965). In *Norwood* v. *Harrison*, 413 U.S. 455, 463-464 (1973), a case involving the validity of a state program of lending textbooks to children attending racially segregated private schools, the court stated:

> Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves (cases omitted). An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination.

See also, *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 784 (1973), where it was held that "the effect of the aid is unmistakably to provide desired financial support for non-public sectarian institutions" when New York State made tuition reimbursement payments to parents, rather than to the schools directly.

There is, of course, one significant difference between *Bob Jones* and the present case. In *Bob Jones* discrimination was found in the admission policy of the school which precluded some blacks from ever attending the institution.

Thus, all programs and activities of the institution were affected by the discrimination and the termination of tuition payments to the institution was not inconsistent with the provision in Title VI, 42 U.S.C. 2000d-1, similar to Section 902, of Title IX, 20 U.S.C. 1682, that termination shall be limited in effect to the particular program in which noncompliance has been found.

Here, since Hillsdale is coeducational, the question of discrimination, if there is discrimination at all, is more likely to turn on its presence or absence in specific activities carried on by Hillsdale.[11] The termination of student aid payments, however, could affect all of Hillsdale's programs and activities, and not just the specific programs in which discrimination exists. But, we are dealing in abstractions and surmise in this regard as termination need not be the remedy pursued. Hillsdale argues that the pervasive effect of terminating student aid demonstrates that such payments are not the type of payments intended to be included as Federal financial assistance under Title IX, for their termination would be inconsistent with the statute's mandate that sanctions are to be imposed only with respect to specific programs in which discrimination has been found.

Hillsdale's argument really turns on the question of what is the "education program or activity" to which Federal assistance has been extended. The term is not defined either in Title IX or in the regulations. Such words could be read narrowly to mean only the specific programs directly receiving Federal payments, which in this case would be the NDSL, SEOG, and BEOG programs and Hillsdale could be subject to Title IX only in the manner in which it administers these programs.

But, as the court in *Bob Jones University* noted in construing Title VI, "the literal language . . . requires only

[11] Admissions to private undergraduate institutions also appear to be excluded from Title IX, by Section 901(a)(1), 20 U.S.C. 1681(a)(1).

federal assistance—not payment—to a program or activity . . . ." 396 F.Supp. at 602. It seems to us, by virture of payments and assistance involved herein that, as stated by the General Counsel, "the *entire* institution is financially supported through payments made by students to Hillsdale under the BEOG, SEOG, NDSL . . . programs. Thus, it is the entire entity, Hillsdale College, which must vouch that each education program or activity operated by it will be operated in compliance with Title IX." Unlike the situation presented in the cases cited by Respondent Institution, which cases are distinguishable by reason thereof, the monies ultimately received by Hillsdale are not earmarked for a specific program but are utilized for general educational purposes or activities. Respondent Institution would substitute form for substance. It would be unrealistic not to look at the school's education programs and activities generally, to the support of which the Federal payments contribute. If there is discrimination on the basis of sex in these activities, then the Federal payments may well be employed in aiding that discrimination. In addition, the court in *Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 F.2d 1068, 1079 (5th Cir. 1969), recognized that particular programs could be so infected by discriminatory practices elsewhere as to become discriminatory.

In addition, as the General Counsel points out, the "pinpoint provision" for terminating assistance emphasized by Respondent Institution, applies to the sanction to be imposed when a discrimination is found. It is relevant, accordingly, in determining whether the termination of funds should be ordered. It is noted again, in this connection, that a similar "pinpoint provision" was involved in the *Bob Jones* case. The question of whether the Federal monies made available through student aid programs are financial assistance to Hillsdale, however, is a different question, and it cannot be said as a matter of law that they are not.

Finally, it is concluded that the GSL program comes within the exception for a contract of insurance or guaranty in Section 902. These loans are obtained from private lenders and are available to students in eligible educational institutions. An eligible educational institution is generally a public or non-profit institution of higher education (i.e., beyond secondary education), or a vocational school legally authorized by the State to provide a program of education and accredited by a recognized accrediting agency. 45 CFR 177.11. Where the proper showing of financial need is made, the Government in addition to guaranteeing the loan will also pay the interest on the loan during the time the borrower attends school and also during the period that the borrower serves in the armed forces or is unemployed or is attending a graduate or fellowship program. 45 CFR 177.21(b). The General Counsel argues that these interest payments make the program more than a contract of guaranty and bring the entire loan within the purview of Title IX. The payments of interest, however, are not made to the student for payment to Hillsdale, nor are they made to Hillsdale. They are made to the lender. The only payment made to the student is the loan which is excluded from Title IX. The loan itself is disbursed from funds provided by the lender and not, as in the case of the other programs, by the Government. The interest payment appears to be a part of the contract of guaranty with the lender, and to come within the exclusion provided for such loans.

III

We turn now to the consequences of Respondent Institution's refusal to sign the Assurance of Compliance. Hillsdale does not contest the authority of DHEW to require such an assurance in its regulations issued pursuant to Section 902. Such section further provides, in part, that "Compliance with any requirement adopted pursuant to this section may be effected (1) by the termina-

tion of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . ."

The General Counsel concedes that there is neither an allegation or finding of discrimination herein and contends that the only matter at issue is one of threshold compliance. The only violation charged in this proceeding is Hillsdale's refusal to sign an Assurance of Compliance as required by 45 CFR 86.4.[12] It is provided in 45 CFR 80.8(b), which is incorporated in the regulations under Title IX by 45 CFR 86.71, that Federal financial assistance *may* be refused if an applicant refuses to furnish an Assurance of Compliance. The termination of funds for refusal to file an Assurance of Compliance is made discretionary and not mandatory by the regulation.

If the Assurance of Compliance were simply a commitment by Hillsdale that it will use its best efforts to comply with Title IX and the regulations lawfully issued thereunder, (*cf., Gardner* v. *State of Alabama Dept. of Pensions and Security*, 335 F.2d 804, 815 (5th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968)), there would be less justification for Hillsdale's refusal to sign it. The assurance, however, is described in the explanation accompanying it as a "legally enforceable agreement to comply with Title IX and all the requirements of [the regulations]" and the General Counsel argues that the assurance would impose a contractual duty on Hillsdale to comply with Title IX and its regulations, citing *Lau* v. *Nichols*, 414 U.S. 563 (1974).

Of great significance to the issue of the consequences of Hillsdale's refusal to sign the assurance is the fact

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[12] The assurance is a standard form which, in part, requires Hillsdale to agree to comply, *to the extent applicable to it*, with Title XI and all applicable requirements imposed by the regulations issued pursuant thereto.

that DHEW, in reality, is requiring or demanding that Respondent Institution agree to comply as a condition of the continued receipt of Federal financial assistance, with a portion of the pertinent regulations which has been declared invalid. That part of the regulations involved relating to the prohibition of sex discrimination in employment (45 CFR 86.51 - 86.61) has been held invalid in whole or in part by several courts. *Romeo Community Schools* v. *United States Department of Health, Education, and Welfare*, 438 F.Supp. 1021 (E.D. Mich. 1977), *appeal docketed*: *Brunswick School Board* v. *Califano*, 449 F.Supp. 866 (D.Me. 1978); *Seattle University* v. *HEW*, No. C-77-6315 (W.D. Wash., January 20, 1978). See also *Board of Education of the Bowling Green City School District* v. *United States Department of Health, Education and Welfare*, No. C 78-177 (N.D. Ohio May 5, 1978). The General Counsel does not address the question of whether the regulations dealing with employment are invalid, other than to question generally the authority of the Administrative Law Judge to rule on the validity of the regulations in this proceeding (But see footnote 7). Nor does the General Counsel indicate whether sections 86.51-86.61 of the regulations are not to be included, in effect, within the regulations to be covered by the Assurance of Compliance. Apparently, they are to be so included.

It seems to us that DHEW may not have power to require compliance with the regulations dealing with employment as a condition precedent to Hillsdale's continued receipt of the funds involved as such regulations have been declared to be and may well be beyond the scope of its authority under the Act. It would be an abuse of discretion and arbitrary and capricious to terminate the pertinent programs listed above by reason of Respondent Institution's failure and refusal to sign the Assurance of Compliance under these circumstances.

The remaining regulations challenged by Hillsdale College, such as those dealing with recruiting students, the status of unmarried women students who become pregnant, classes in certain subjects composed of students of one sex, or differentiation between sexes in dormitory regulations, are not, in reality, ripe for review at this stage. The applicability and meaning of such regulations will depend on how DHEW construes its regulations in relation to actual policies and practices of Respondent Institution. *Cf. Toilet Goods Ass'n.* v. *Gardner*, 387 U.S. 158 (1967). We cannot rule in the abstract. Respondent Institution claims that it does not discriminate and that may well be the case. It seems to us that a factual framework is essential within which to judge such regulations in the context of performance by Hillsdale College thereunder. In the briefs presented herein, the parties take extremely different views as to the meaning or scope of the regulations and until a specific alleged violation by Hillsdale of a particular regulation is charged, a meaningful determination cannot be made. We do not find at this time, however, that such regulations, in the abstract, are beyond the scope of authority conferred upon DHEW by the Act as a matter of law.

All contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this Initial Decision are denied.

Order

By reason of the foregoing, the relief requested by the General Counsel is denied and the Notice of Hearing is hereby dismissed.

/s/ Herbert L. Perlman
HERBERT L. PERLMAN
Administrative Law Judge

August 23, 1978

APPENDIX D

[EDUCATION AMENDMENTS OF 1972, TITLE IX 20 U.S.C. §§ 1681 *ET SEQ.*]

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and the public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and prin-

cipally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such indi-

vidual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) Educational institution defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

(Pub. L. 92-318, title IX, § 901, June 23, 1972, 86 Stat. 373; Pub. L. 93-568, § 3(a), Dec. 31, 1974, 88 Stat. 1862; Pub. L. 94-482, title IV, § 412(a), Oct. 12, 1976, 90 Stat. 2234.)

§ 1682. Federal administrative enforcement; report to congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such

action shall become effective until thirty days have elapsed after the filing of such report.

(Pub. L. 92-318, title IX, § 902, June 23, 1972, 86 Stat. 374.)

§ 1683. Judicial review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

(Pub. L. 92-318, title IX, § 903, June 23, 1972, 86 Stat. 374.)

APPENDIX E

[34 C.F.R. PART 106 (1982)]

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

Subpart A—Introduction

Sec.

Subpart B—Coverage

Subpart C—Discrimination on the Basis of Sex In Admission and Recruitment Prohibited

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

Subpart E—Discrimination on the Basis of Sex In Employment in Education Programs and Activities Prohibited

Sec.

Subpart F—Procedures [Interim]

SOURCES 45 FR 30955, May 9, 1980, unless otherwise noted.

Subpart A—Introduction

§ 106.1 Purpose and effective date.

The purpose of this part is to effectuate Title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93-568, 88 Stat. 1855 and Sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93-380)

§ 106.2 Definitions.

As used in this part, the term—

(a) *"Title IX"* means Title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *"Department"* means the Department of Education.

(c) "*Secretary*" means the Secretary of Education.

(d) "*Assistant Secretary*" means the Assistant Secretary for Civil Rights of the Department.

(e) "*Reviewing Authority*" means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) "*Administrative law judge*" means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) "*Federal financial assistance*" means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or

permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) "*Recipient*" means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) "*Applicant*" means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) "*Educational institution*" means a local educational agency (LEA) as defined by section 1001(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) '*Institution of graduate higher education*" means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an

institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) "*Institution of undergraduate higher education*" means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) "*Institution of professional education*" means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(n) "*Institution of vocational education*" means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semi-skilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(o) "*Administratively separate unit*" means a school, department or college of an educational institution (other

than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) "*Admission*" means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) "*Student*" means a person who has gained admission.

(r) "*Transition plan*" means a plan subject to the approval of the Secretary pursuant to section 901(a)(2) of the Education Amendment of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980; 45 FR 37426, June 3, 1980]

§ 106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c) (ii) of this section and of any remedial steps taken pursuant to paragraph (c) (iii) of this section.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.4 Assurance required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary

if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980]

§ 106.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education pro-

gram or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of Subpart B of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employees.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of

elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that it is required by Title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of Title IX and this part to such recipient may be referred to the employee designated pursuant to § 106.8, or to the Assistant Secretary.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in:

(i) Local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart B—Coverage

§ 106.11 Application.

Except as provided in this subpart, this Part 106 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 86298, Dec. 30, 1980]

§ 106.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a)

of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been tradition-

ally limited to members of one sex and principally to persons of less than nineteen years of age.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; Sec. 3(a) of P.L. 93-568, 88 Stat. 1862 amending Sec. 901)

§ 106.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§ 106.16 and 106.17, and Subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of Subpart C.* Except as provided in paragraphs (d) and (e) of this section, Subpart C applies to each recipient. A recipient to which Subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, Subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980]

§ 106.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which Subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of Subpart C unless it is carrying out a transition plan approved by the Secretary as described in § 106.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.17 Transition plans.

(a) *Submission of plans.* An institution to which § 106.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed.

The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 106.16 applies shall result in treatment of applicants to or students of such recipient in violation of Subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 106.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs

which emphasize the institution's commitment to enrolling students of the sex previously excluded.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 106.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 106.16 and 106.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or

criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 106.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 106.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

§ 106.31 Education programs and activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided*, a recipient educational institution which administers or assists in the administration of such Scholarships, fellowships, or other awards which are restricted

to members of one sex provides, or otherwise makes available, reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Programs not operated by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient;

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

§ 106.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

§ 106.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, includ-

ing health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and activities at the secondary and postsecondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.35 Access to schools operated by L.E.A.s.

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that

such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amounts or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or (3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex

specified therein; *Provided*, That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 106.38 Employment assistance to students

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates Subpart E of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or actiivty.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramu-

ral athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 106.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

§ 106.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not

limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination

of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient

has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupation qualification for the positions in question as set forth in § 106.61.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.56 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 106.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she

held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.60 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart F—Procedures [Interim]

§ 106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR, Part 101.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

APPENDIX F

HEW FORM 639A

ASSURANCE OF COMPLIANCE WITH TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 AND THE REGULATION ISSUED BY THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE IN IMPLEMENTATION THEREOF

(PLEASE READ EXPLANATION OF HEW FORM 639 A (3/77)* BEFORE COMPLETING THIS DOCUMENT)

Pursuant to 45 C.F.R. 86.4:

Hillsdale College
Hillsdale, Michigan
49242 2272

(city, state, zip code)

(identifying code-FICE, OE, or IRS)

(hereinafter the "Applicant") gives this assurance in consideration of and for purpose of obtaining Federal education grants, loans, contracts (except contracts of insurance or guaranty), property, discounts, or other Federal financial assistance to education programs or activities from the Department of Health, Education, and

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* HEW Form 639 A (3/77) This form supersedes HEW Form 639 (7/76). HEW Form 639 (7/76) submitted prior to this revision are valid and recipients need not submit a new assurance.

Welfare (hereinafter the "Department"), including payments or other assistance hereafter received pursuant to applications approved prior to the date of this assurance.

ARTICLE I—TYPE OF INSTITUTION SUBMITTING ASSURANCE.

A. The Applicant is (check the following boxes where applicable):

1. ( ) A state education agency.
2. ( ) A local education agency.
3. ( ) A publicly controlled educational institution or organization.
4. ( ) A privately controlled educational institution or organization.
5. ( ) A person, organization, group or other entity not primarily engaged in education. If this box is checked, insert primary purpose or activity of Applicant in the space provided below:

B. ( ) Claiming a religious exemption under 45 C.F.R. 86.12(b). (If religious exemption is claimed, attach statement by highest ranking official of Applicant identifying the specific provisions of 45 C.F.R. Part 86 which conflict with a specific religious tenet of the controlling religious organization.)

C. The Applicant offers one or more of the following programs or activities (check where applicable):

1. ( ) Pre-school
2. ( ) Kindergarten
3. ( ) Elementary or Secondary

4. ( ) Graduate

5. ( ) Other (such as special programs for the handicapped even if provided on the preschool, elementary or secondary level). If this box is checked, give brief description below:

6. ( ) Undergraduate (including junior and community colleges)

7. ( ) Vocational or Technical

8. ( ) Professional

ARTICLE II—PERIOD OF ASSURANCE. This assurance shall obligate the Applicant for the period during which Federal financial assistance is extended to it by the Department.

ARTICLE III—TERMS AND CONDITIONS. The Applicant hereby agrees that it will:

1. Comply, to the extent applicable to it, with Title IX of the Education Amendments of 1972 (P.L. 92-318), as amended, 20 U.S.C. 1681, 1682, 1683, and 1685 (hereinafter, "Title IX"), and all applicable requirements imposed by or pursuant to the Department's regulation issued pursuant to Title IX, 45 C.F.R. Part 86 (hereinafter, "Part 86"), to the end that, in accordance with Title IX and Part 86, no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any education program or activity for which the Applicant receives or benefits from Federal financial assistance from the Department. (This assurance does not apply to sections 904 (proscribing denial of admission to course of study on the basis of blindness) and 906 (amending other laws) of Title IX, 20, U.S.C. 1684 and 1685.)

2. Assure itself that all contractors, subcontractors, subgrantees or others with whom it arranges to provide services or benefits to its students or employees in connection with its education program or activity are not discriminating on the basis of sex against these students or employees.

3. Make no transfer or other conveyance of title to any real or personal property which was purchased or improved with the aid of Federal financial assistance covered by this assurance, and which is to continue to be used for an education program or activity and where the Federal share of the fair market value of such property has not been refunded or otherwise property accounted for to the Federal government, without securing from the transferee an assurance of compliance with Title IX and Part 86 satisfactory to the Director and submitting such assurance to the Department.

4. Submit a revised assurance within 30 days after any information contained in this assurance becomes inaccurate.

5. If the Applicant is a state education agency, submit reports in a manner prescribed by the Director under 45 C.F.R. 80.6(b) as to the compliance with Title IX and Part 86 of local education agencies or other education programs or activities within its jurisdiction.

ARTICLE IX—DESIGNATION OF RESPONSIBLE EMPLOYEE AND ADOPTION OF GRIEVANCE PROCEDURES. (Check the appropriate box.)

A. 1. ( ) Pursuant to 45 C.F.R. 86.8, the Applicant has adopted grievance procedures and designated the following employee to coordinate its efforts to comply with Part 86 and has notified all of its students and employ-

ees of these grievance procedures and the following name, address and telephone number of the designated employee:

2. _____
(name of employee)

3. _____
(office address)

4. _____
(telephone number)

B. 1. ( ) The Applicant is not presently receiving Federal financial assistance subject to Part 86 and, consequently, has not designated a responsible employee or adopted grievance procedures pursuant to 45 C.F.R. 86.8 but will do so immediately upon award of such assistance and will immediately notify the Director, its students and employees of the name, office address, and telephone number of the employee so designated.

ARTICLE V—SELF-EVALUATION. (Check the appropriate box.)

A. ( ) The Applicant has completed a self-evaluation as required by 45 C.F.R. 86.3(c) and has not found it necessary to modify any of its policies and practices or to take any remedial steps to come into compliance with Part 86.

B. ( ) The Applicant has completed a self-evaluation as required by 45 C.F.R. 86.3(c) and has ceased to carry out any policies and practices which do not or may not meet the requirements of Part 86 and is taking any necessary remedial steps to eliminate the effects of any dis-

crimination which resulted or may have resulted from adherence to such policies and practices.

C. ( ) The Applicant has not completed the self-evaluation required by 45 C.F.R. 86.3(c) but expects to have it completed by _____.
insert date

D. ( ) The Applicant is not required to conduct a self-evaluation under 45 C.F.R. 86.3 since it did not receive any Federal financial assistance to which Part 86 applies prior to July 21, 1976.

Date: _____ _____
(Insert name of Applicant)

By

_____
(This document must be signed by an official legally authorized to contractually bind the Applicant.)

_____
(Insert title of authorized official.)

APPENDIX G

[LETTER FROM ASSISTANT ATTORNEY GENERAL WM. BRADFORD REYNOLDS TO CLARENCE M. PENDLETON, JR., CHAIRMAN OF THE U.S. COMMISSION ON CIVIL RIGHTS, DATED SEPTEMBER 16, 1982]

Office of the Assistant Attorney General
Washington, D.C. 20530

September 16, 1982

Mr. Clarence M. Pendleton, Jr.
Chairman
U.S. Commission on Civil Rights
Washington, D.C. 20425

Dear Penny:

Out of an abundance of caution, the Attorney General has determined that, because of his prior membership on the Board of Regents of the University of California, he should recuse himself from participation in the *University of Richmond* case. I have, therefore, been asked to respond to your August 10 letter inquiring about a possible appeal from the *Richmond* decision.

As you know, the Department of Education (DOEd) and the Department of Justice (DOJ) agreed not to seek appellate review of Judge Warriner's ruling that DOEd lacked authority under Title IX of the Educational Amendments Act of 1972, and its implementing regulations, to investigate Richmond's athletic program. In reaching this conclusion, the views set forth in your August 10 letter were fully considered. While we found ourselves in disagreement with your recommended course of action on this occasion, the wise counsel of the Civil Rights Commission is always valued and we trust that

you will continue to share your thoughts and analysis with us on future issues of similar importance.

In *Richmond*, we were guided principally by the particulars of the case before us and Judge Warriner's application of existing law to the stipulated facts. The University's athletic program admittedly received no direct federal financial assistance. Nor did DOEd seek to initiate its investigation on the claim that the athletic program was receiving federal funding indirectly. Rather, the jurisdictional nexus for sending federal agents onto Richmond's campus was tied solely to the fact that the University received federal funds through student financial aid programs (i.e., Basic Educational Opportunity Grants; Supplementary Educational Opportunity Grants; Student Worker Wages; Guaranteed Student Loans) and through a single Library Grant.

The position advanced by the then director of DOEd's Office of Civil Rights, and rejected by the district court, was that receipt by Richmond students of even a single dollar of federal funds is sufficient to subject all of the University's programs and activities to Title IX scrutiny —even those programs and activities that receive no federal funds. This interpretation of the statute effectivly removes from Title IX the "program specificity" feature that was recognized as an essential component of the legislation in the Supreme Court's decision last Term in *North Haven Board of Education* v. *Bell*, 50 U.S.L.W. 4501 (1982). As there stated: "an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902. 50 U.S.L.W. at 4507.

In light of the clear language of Sections 901 and 902, the accompanying legislative history, and the Supreme Court's recent pronouncement of the intended scope of Title IX coverage, we found Judge Warriner's opinion to be both analytically and legally sound. Its conclusion that only those University programs and activities shown to

be recipients of federal funds are within the reach of Title IX is fully consistent with the better reasoned judicial precedents in the area. *See Rice* v. *President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981); *Bennett* v. *West Texas State University*, No. 280-0073-f (N.D. Tex., July 27, 1981); *Othen* v. *Ann Arbor School Board*, 507 F. Supp. 1376 (E.D. Mich. 1981).

On this last point, the two recent Third Circuit decisions to the contrary have neither been ignored nor lightly dismissed. See *Grove City Community College* v. *Bell*, No. 81-0406 (July 8, 1982); *Haffer* v. *Temple University*, No. 82-1049 (September 7, 1982). Dictum in *Grove City*, which another Third Circuit panel considered to be controlling in *Temple*, states that the University as a whole can be considrered the "program" for the purpose of Title IX coverage once at least one dollar of federal educational funds goes to any student enrolled at the school. In seeking to ascertain from the statute's language and history whether or not Congress intended so expansive an interpetation of the phrase "program or activity," we were satisfied that Judge Warriner's opinion in *Richmond* had the best of it. Accordingly, there was, in the opinion of both DOEd and DOJ, no cause for an appeal of *Richmond* to the Fourth Circuit.

I would in closing add only that this "no appeal" decision suggests no retrenchment of our enforcement responsibilities under Title IX—as some in the political arena have been quick to assert. The *Richmond* opinion in no way tolerates sex discrimination in federally funded programs; nor does it allow DOEd to ignore its Title IX investigatory responsibilities upon receipt of a complaint containing factual allegations of sex bias in a directly aided program. Moreover, if gender-based discriminatory behavior so pervades a nonfunded program that it "infects" a funded program, we read Judge Warriner's opinion as recognizing a DOEd investigatory responsibility in such circumstances.

It is primarily in this respect that we had some differences with your August 10 letter. The "far-reaching" implications that you hypothesized might perhaps flow from the *Richmond* ruling do not, as we read the opinion, follow from the program-specific analysis used by the district court. That DOEd must make a showing that the program or activity to be investigated is indeed a recipient of federal funds seems to us to be neither inappropriate nor unduly burdensome.

I hope that the above discussion satisfactorily explains our decision not to appeal the *Richmond* decision. If you have further questions, we can perhaps further discuss this matter on your next trip to Washington.

Sincerly,

/s/ Wm. Bradford Reynolds
WM. BRADFORD REYNOLDS
Assistant Attorney General
Civil Rights Division

cc: John Hope III

No. 82-1538

In the Supreme Court of the United States

OCTOBER TERM, 1982

HILLSDALE COLLEGE, PETITIONER

v.

DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner is a recipient of "Federal financial assistance" as that term is used in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and is therefore required to execute an "Assurance of Compliance" with Title IX.

2. Whether petitioner's entire operation is a "program or activity" subject to Title IX because its students receive federal grants and loans.

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In the Supreme Court of the United States

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HILLSDALE COLLEGE, PETITIONER

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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 696 F.2d 418. The Final Decision of the Civil Rights Reviewing Authority in the Department of Health, Education, and Welfare (Pet. App. 43a-54a) is not reported. The Initial Decision by the Administrative Law Judge (*id.* at 55a-79a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a) was entered on December 16, 1982. The petition for a writ of certiorari was filed on March 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Sections 901 and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681-1682, and the applicable regulations, 34 C.F.R. Part 106, are reproduced at Pet. App. 80a-124a.

STATEMENT

1. Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, provides in Section 901(a) (20 U.S.C. 1681(a)):

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

Section 902 (20 U.S.C. 1682) authorizes the Department of Education to promulgate regulations to implement that provision, and to enforce its regulations by terminating federal assistance to any noncomplying education program or activity conducted by a recipient. The Department has adopted regulations[1] that define "Federal financial assistance" to include (34 C.F.R. 106.2(g)(1)(ii)):

> Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

The regulations also define a "recipient" of such assistance as (34 C.F.R. 106.2(h)):

> any * * * private * * * institution * * * to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

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[1]The regulations were actually issued by the Department of Health, Education, and Welfare ("HEW"), and were initially codified at 45 C.F.R. Part 86. Although HEW was responsible for the administration of Title IX when enforcement proceedings were begun against petitioner, we will refer for the sake of simplicity to the Department of Education and to the regulations as they now appear in 34 C.F.R. Part 106.

In order to monitor compliance with the statute and regulations, the Department has required that each recipient of federal financial assistance provide "assurance * * * that each education program or activity * * * to which this part applies will be operated in compliance with this part." 34 C.F.R. 106.4(a). In practice the assurance of compliance is provided by signing a form (34 C.F.R. 106.4(c)). The Assurance of Compliance Form which petitioner was requested to sign (Form 639A) simply states (Pet. App. 127a):[2]

> The applicant hereby agrees that it will:
>
> 1. Comply, to the extent applicable to it, with Title IX of the Education Amendments of 1972 * * * and all applicable requirements imposed by or pursuant to the Department's regulation issued pursuant to Title IX * * *.

2. Petitioner Hillsdale College is a private, nonsectarian, coeducational college located in Hillsdale, Michigan. Although the College does not accept any direct federal or state aid, approximately one fourth of its students receive federal aid under various loan or grant programs.[3] In 1977,

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[2]A new form, adopted by the Department of Education in 1980, is reproduced as an Appendix to this brief. It contains a similar assurance.

[3]The school has an enrollment of approximately 1000 students. In 1977-1978, 107 students received National Direct Student Loan ("NDSL") aid under 20 U.S.C. 1087aa-1087ff. Fifty-four students received grants under the Basic Educational Opportunity Grant ("BEOG") Program, 20 U.S.C. 1070a. Fifty-three students were awarded federal funds by petitioner under the Supplementary Educational Opportunity Grant ("SEOG") Program, 20 U.S.C. 1070b-1070b-3. Fifty-one students secured Guaranteed Student Loans under 20 U.S.C. 1071-1087-4. Pet. App. 3a-4a. NDSL loans are made from a fund at the school (which may consist largely of federal contributions) and are repaid to the school, which then uses the money to make new loans. SEOG grants are similarly administered by the school itself.

(footnote continued)

after petitioner had refused voluntarily to execute an Assurance of Compliance, the Department instituted administrative enforcement proceedings. The administrative law judge ruled, on stipulated facts, that petitioner was a recipient of federal financial assistance within the meaning of Title IX because of the payments made to its students (Pet. App. 68a).[4] The administrative law judge nevertheless concluded that petitioner was not required to execute an Assurance of Compliance, because doing so would obligate the College to comply with regulations concerning sex discrimination in employment (see 34 C.F.R. 106.51-106.61), which several courts had held invalid (Pet. App. 77a-78a).[5]

Both the Department and petitioner filed exceptions with the Department's Civil Rights Reviewing Authority. The Reviewing Authority denied petitioner's exceptions, and agreed with the Department that petitioner was required to execute an Assurance of Compliance. By doing so, the Reviewing Authority concluded, petitioner would bind itself only to comply with lawful regulations; the validity of the employment regulations was therefore irrelevant to this enforcement action (Pet. App. 52a).[6]

BEOG grants may be made directly to students following certification by the school. GSL loans are made by private lending institutions and guaranteed by the federal government (Pet. App. 59a-60a).

[4]The administrative law judge found, though, that the GSL program fell within the exemption provided in Title IX for contracts of insurance or guaranty. 20 U.S.C. 1682 (Pet. App. 76a).

[5]In *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), this Court subsequently held that employment discrimination came within the prohibition in Section 901(a) (20 U.S.C. 1681(a)), and that the regulations at 34 C.F.R. 106.51-106.61 were valid.

[6]The Reviewing Authority also disagreed with the administrative law judge's determination that the GSL Program fell within Title IX's exemption for contracts of insurance or guaranty (see note 4, *supra*), since the government not only guaranteed such loans but also paid interest on them (Pet. App. 52a-54a). This question is not before this Court in this case.

3. Petitioner sought review of the decision in the Sixth Circuit pursuant to 20 U.S.C. 1683. It argued that the receipt by its students of federal financial assistance did not make it a "recipient" of assistance for purposes of Title IX. Petitioner also argued that its failure to sign an Assurance of Compliance did not justify termination of federal assistance, since under the statute that sanction could be invoked only upon a showing of actual sex discrimination. Finally petitioner contended that, even if it were subject to regulation under Title IX as to its student loan and grant programs, the Assurance of Compliance was inconsistent with the "program-specific" limitations in Title IX because the Department had interpreted it as subjecting the entire institution to regulation if its students received loans and grants (Pet. App. 6a-7a).

The court of appeals reversed the order of the Reviewing Authority.[7] It agreed with the Department that petitioner was a "recipient" of federal financial assistance within the meaning of Section 901 because its students received federal loans and grants. The court went on to say that in such cases "the student loan and grant program is subject to Title IX regulation" (Pet. App. 25a). The court also agreed with the Department that federal funds could be cut off without a finding that the college was actually discriminating on the basis of sex (*ibid.*). Nevertheless, the court concluded that (*id.* at 25a-26a):

> the regulation requiring [petitioner] to execute the Assurance of Compliance as a condition for its students receiving loans and grants is, as it is applied here,

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[7]The judgment was entered on December 16, 1982 (Pet. App. 42a). Judge Brown noted that Judge Cecil had concurred in his opinion prior to his death on November 26, 1982 (Pet. App. 1a n.*). Chief Judge Edwards dissented.

> an invalid regulation. This is true because the regulation and the Assurance, as interpreted and applied by [the Department], cover the entire college and are not limited to the student loan and grant program.[8]

Chief Judge Edwards dissented. He would have upheld the decision of the Reviewing Authority on the ground that, under each of the assistance programs from which Hillsdale students receive grants and loans, the federal government provides "funds which when paid to the college are used for the general support of the educational program of the college as a whole" (Pet. App. 34a). He concluded that if a college receives federal financial assistance in that manner, Congress intended Title IX's prohibition of sex discrimination to apply to the college as a whole (*id.* at 35a-39a).

DISCUSSION

1. This case is similar to *Grove City College* v. *Bell*, cert. granted, No. 82-792 (Feb. 22, 1983). In *Grove City College*, as here, the Department determined that the college was a recipient of federal financial assistance because its students used federal grants and loans to finance their education. When Grove City refused to execute an Assurance of Compliance, the Department instituted enforcement proceedings to terminate assistance for Grove City students under the Basic Educational Opportunity Grant ("BEOG") and Guaranteed Student Loan Programs. The Third Circuit held that Grove City must file the Assurance of Compliance required by the Title IX regulations because the College was a recipient of federal financial assistance within the meaning of Title IX by virtue of its participation in the Department's BEOG program.

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[8]Because of that conclusion, the court found it unnecessary to decide whether the GSL Program fell within the exemption found in Section 902 for contracts of insurance or guaranty.

In this case the Department instituted enforcement proceedings against petitioner for the same reason. The Sixth Circuit, like the Third Circuit in *Grove City College*, held that petitioner was a recipient of federal financial assistance within the meaning of Title IX by virtue of its participation in the Department's various loan and grant programs. The Sixth Circuit also agreed with the Third Circuit that termination of funds was an appropriate sanction for failure to comply with the Department's Title IX regulations, even absent a showing of sex discrimination (cf. 82-792 Pet. App. A35-A37). The court of appeals in this case nevertheless concluded that the Department could not require petitioner to execute an Assurance of Compliance, because it read that assurance as requiring compliance by the entire college, rather than by particular programs receiving federal funds.

2. The petition presents two questions for review. The first is whether petitioner is a recipient of "Federal financial assistance" within the meaning of Title IX because many of its students finance their education with federal grants and loans. The identical question is presented by the petition in *Grove City College, supra*, 82-792 Pet. i, Question 1. Both the Third Circuit in that case and the Sixth Circuit in this case agreed that a college is a recipient of "Federal financial assistance" under those circumstances. There is, consequently, no independent need to grant plenary review here on this issue; resolution of it should await the Court's decision in *Grove City College*.

3. The second question presented by petitioner is whether its entire operation is a "program or activity" subject to Title IX because its students pay a portion of their tuition with federal grants and loans. This question too is presented by the petition in *Grove City College, supra*, 82-792 Pet. i,

Question 2.[9] With respect to this question, too, the petition should be held pending the decision in *Grove City College*.

4. The "questions presented" by petitioner also raise the issue whether petitioner, if it is a "recipient" of "Federal financial assistance," is required to execute an Assurance of Compliance with Title IX. The court of appeals held that petitioner was not required to do so, "because the regulation and the Assurance, as interpreted and applied by [the Department], cover the entire college and are not limited to the student loan and grant program" (Pet. App. 25a-26a). In reaching that conclusion the court misapprehended the position the Department set forth in its supplemental brief to take account of this Court's decision in *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982). The Department there stated[10] that the assurance is

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[9]We wish to point out that petitioner prevailed on this issue in the court of appeals. And although 28 U.S.C. 1254(1) allows "any party" to petition for a writ of certiorari, this Court has apparently never granted a petition filed by one prevailing on the merits in the court of appeals. See R. Stern & E. Gressman, *Supreme Court Practice* 58-59 (5th ed. 1978); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4004, at 524-525 (1977 & 1982 Pocket Part); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 70-71 n.5 (1977).

[10]Supplemental Brief for Respondents at 3-4, *Hillsdale College* v. *Department of Education*, 696 F.2d 418 (6th Cir. 1982):

> In its decision in *North Haven*, * * * the Supreme Court agreed with the Department's position that the portion of the regulations setting out their purpose (34 C.F.R. 106.1 * * *) *is* program-specific and limits the scope of the regulations as a whole (slip op. 26-27). * * * All that the assurance of compliance requires the College to do is to agree to comply with the regulations as to any of its programs or activities which receives the assistance of student loan and grant funds provided by the federal government. * * * [W]e believe that * * * at least some of the education programs and activities of the College receive that assistance. In

coextensive with Title IX's coverage, and thus applies only to those programs and activities that receive federal support. The Department does not contend that execution of an assurance acknowledges Title IX coverage of an entire institution regardless of the nature of the federal financial assistance. Rather, the Department agrees with the court of appeals that Title IX's nondiscrimination requirements apply only to those educational programs and activities of an institution that receive federal financial assistance. Accordingly, assurances of compliance must also be written and construed in a program-specific manner.

Because the facts and issues presented by the two cases are similar, this Court's decision in *Grove City College* will likely determine whether the court of appeals was correct in concluding that petitioner was not required to execute an Assurance of Compliance.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Grove City College* v. *Bell*, No. 82-792, and should then be disposed of as appropriate in light of that decision.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

APRIL 1983

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attacking the regulations as a threshold matter, the College would need to show that it operates no education program or activity that receives federal financial assistance. This it has not done.

We have lodged a copy of the Department's supplemental brief with the Court.

DOJ-1983-04

APPENDIX

CIVIL RIGHTS CERTIFICATE

ASSURANCE OF COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, SECTION 504 OF THE REHABILITATION ACT OF 1973, TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, AND THE AGE DISCRIMINATION ACT OF 1975

The applicant provides this assurance in consideration of and for the purpose of obtaining Federal grants, loans, contracts (except contracts of insurance or guaranty), property, discounts, or other Federal financial assistance to education programs or activities from the Department of Education.

The applicant assures that it will comply with:

1. Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance.

2. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, which prohibits discrimination on the basis of handicap in programs and activities receiving Federal financial assistance.

3. Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681 *et seq.*, which prohibits discrimination on the basis of sex in education programs and activities receiving Federal financial assistance.

4. The Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 *et seq.*, which prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance.

5. All regulations, guidelines, and standards lawfully adopted under the above statutes by the United States Department of Education.

The applicant agrees that compliance with this Assurance constitutes a condition of continued receipt of Federal financial assistance, and that it is binding upon the applicant, its successors, transferees, and assignees for the period during which such assistance is provided. The applicant further assures that all contractors, subcontractors, subgrantees or others with whom it arranges to provide services or benefits to its students or employees in connection with its education programs or activities are not discriminating in violation of the above statutes, regulations, guidelines, and standards against those students or employees. In the event of failure to comply the applicant understands that assistance can be terminated and the applicant denied the right to receive further assistance. The applicant also understands that the Department of Education may at its discretion seek a court order requiring compliance with the terms of the Assurance or seek other appropriate judicial relief.

The person or persons whose signature(s) appear(s) below is/are authorized to sign this application, and to commit the applicant to the above provisions.

_____

Date

_____

Authorized Official(s)

_____

Name of Applicant or Recipient

_____

Street

_____

City, State, Zip Code

END OF DOCKET